Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

Treasury Decision

19 CFR Part 4

(T.D. 87-150)

CUSTOMS REGULATIONS AMENDMENTS CONCERNING REPORTING REQUIREMENTS FOR SMALL VESSELS

AGENCY: Customs Service, Department of the Treasury.

ACTION: Interim rule; solicitation of comments.

SUMMARY: This document sets forth interim amendments to the Customs Regulations to implement recent legislative changes to enhance Customs enforcement of the currency reporting and controlled substances laws and assist in preventing the importation of merchandise contrary to law. The statutory changes concern reporting requirements for individuals and vessels, penalties, searches and seizures. To clarify vessel reporting requirements and to implement new vessel reporting requirements for small vessels arriving in the Miami, Florida, Customs District, operators of small vessels arriving in that area will be required to stop at one of 14 designated locations and, through a clearly marked Customs telephone, report their arrival to the U.S. to Customs before proceeding to their destination. In addition to the reporting requirements, the amendments also implement legislative provisions which provide for civil and criminal monetary penalties and for the seizure and forfeiture of conveyances used to transport unmanifested merchandise or controlled substances as well as the merchandise thereon.

This action is being taken as part of Customs continuing efforts to interdict the smuggling of controlled substances and other merchandise being introduced contrary to law into the southern Florida area and to enforce the currency reporting laws. There regulations will close a loophole in interdiction efforts concerning the significant number of small vessels arriving in that area carrying controlled controlled substances, unreported monetary instruments, or undeclared merchandise.

DATES: Effective December 21, 1987. Written comments must be received on or before February 19, 1988.

ADDRESS: Written comments (preferably in triplicate) may be submitted to and inspected at the Regulations Control Branch, Customs Service Headquarters, Room 2324, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: (Operational matters) Glenn Ross, Office of Passenger Enforcement and Facilitation (202–566–5607) or (Legal matters) Larry L. Burton, Carriers, Drawback and Bonds Division (202–566–5706).

SUPPLEMENTARY INFORMATION:

Background

The Anti-Drug Abuse Act of 1986 (Pub. L. 99–570) (the Act), made various changes to the Tariff Act of 1930 relating to the arrival in the U.S. and the reporting to Customs of persons and transportation conveyances; penalties; search and seizure of persons and conveyances; forfeiture and disposition of articles and conveyances; the Customs Forfeiture Fund; aviation smuggling; preclearance; and investigation matters such as records production; undercover Customs operations, informer compensation; and the exchange of information with domestic and foreign Customs and law enforcement agencies. The reporting requirements are consolidated in § 433, Tariff Act of 1930, as amended (19 U.S.C. 1433), which provides, in pertinent part, that vessels must generally report to Customs immediately upon their arrival in the U.S. and in such manner as the Secretary of the Treasury may prescribe by regulation. The Act further amended § 401(k), Tariff Act of 1930, as amended (19 U.S.C. 1401(k)), to clarify that a vessel arriving in the U.S. after visiting a hovering vessel or a point or place where it has received merchandise is deemed to be arriving from a foreign port or place and that controlled substances are generally to be considered as prohibited merchandise. The Act further amended § 594, Tariff Act of 1930, as amended (19 U.S.C. 1594), relating to the seizure and forfeiture of conveyances used for the importation of prohibited merchandise, by narrowing and clarifying the previously existing exceptions to the seizure and forfeiture provisions of that section. This document implements the arrival, reporting, and conveyance seizure and forfeiture provisions of the Act as to "small vessels", as defined. Initially, special procedures for reporting arrivals of small vessels will be limited to arrivals within the Miami, Florida, Customs District, as defined in § 101.3(b), Customs Regulations (19 CFR 101.3(b)). Operators of small vessels arriving in the U.S. in that area will be required to stop at one of 14 small vessel reporting locations before proceeding to their intended destination and, through a clearly marked Customs telephone, immediately report their arrival to Customs. The Customs officer answering the call will ask for information such as: vessel registration number, name of vessel, owner name, operator/passenger name(s), date(s) of birth, foreign ports or

places visited, duration of stay, foreign acquisitions, and user fee decal number, if any. The Customs officer will then instruct the vessel operator that the vessel may proceed or that further action, which may include inspection/examination at another location, is required. The District Director of Customs at Miami will retain the authority to change the nature of reporting locations, their number, or locations. However, initially the following 14 small vessel reporting stations are being designated within the Miami, Florida, Customs District:

Vessels entering the southern and western portions of the Miami District:

1. A & B Marina, 700 Marina St., Key West, Florida 33040.
2. Tavernier Creek Marina, P.O. Box 1000, Tavernier, Florida 33070.
3. Faro Blanco Marine Resort, 1996 Overseas Highway, Marathon, Florida 33050.

Vessels entering the northern portion of the Miami District:

1. Government Cut, Phillips 66 Marina, Watson Island, 1050 MacArthur Causeway, Miami, Florida 33132.
2. Haulover Cut, Bakers Haulover Marina, 10800 Collins Ave., Miami Beach, Florida 33154.
3. Port Everglades Cut, Lauderdale Marina, 1900 S.E. 15th St., Ft. Lauderdale, Florida 33316.
4. Hillsboro Inlet, Sands Harbor Marina/Hotel, 125 North Riverside Dr., Pompano Beach, Florida 33662.
5. The Cove Marina, 1755 S.E. 3rd Court, Deerfield Beach, Florida 33441.
6. Boynton Beach Inlet, Lake Worth Boating Center, 7848 South Federal Highway, Hypoloxo, Florida 33462.
7. Lake Worth Inlet (AKA Palm Beach), Sailfish Marina, 98 Lake Drive, Palm Beach Shores, Florida 33404.
8. Jupiter Inlet, Jupiter Marina, Route 1, Jupiter, Florida 33494.
9. St. Lucie Inlet, Sailfish Marina, 3565 Southeast St., Stuart, Florida 33477.
10. Ft. Pierce Inlet, Pelican Yacht Club, 1120 Seaway Dr., Ft. Pierce, Florida 33454.
11. Sebastian Inlet, Sebastian Inlet Marina and Trading, 1580 U.S. 1, P.O. Box 1507, Sebastian, Florida 32958.

In addition to establishing procedures for reporting the arrival of small vessels in the Miami area, new § 4.2a, Customs Regulations (19 CFR 4.2a), also implements the provisions of the Act which provide for civil monetary penalties for the failure to report arrival and additional civil monetary penalties if unmanifested merchandise is found by Customs on board a non-reporting vessel. The vessel manifest penalties of § 584, Tariff Act of 1930, as amended (19 U.S.C. 1584), are made applicable if the merchandise found on board a non-reporting vessel consists of controlled substances. Criminal monetary penalties and imprisonment are provided for if the failure to report arrival is intentional and if controlled substances are found on board the non-reporting vessel. The civil penalty includes seizure and forfeiture provisions related to the vessel and the merchandise in addition to the monetary penalties.

To clarify the vessel reporting requirements applicable to all vessels, § 4.2, Customs Regulations (19 CFR 4.2), is being amended to provide that vessel reporting requirements may be supplemented by local instructions and that a Customs officer may require documents and papers deemed necessary for the inspection/examination

of vessels as well as cargo and persons on board. In addition, the new § 4.2a(b), Customs Regulations (19 CFR 4.2a(b)), will provide that small vessels in the Miami District will be considered to have arrived when they come to rest within the waters of that district, whether at anchor or at a dock, in any harbor or other location.

These new regulations are part of Customs continuing efforts to combat the problem of drug smuggling by vessel and to more specifically deal with techniques developed by drug smugglers utilizing small vessels for that purpose. Customs will now have greater control over small vessel movements in the southern Florida area because these vessels will now be required to go to designated reporting locations and immediately report their arrival. Thus, smugglers will not be able to proceed to private docks and unload contraband before continuing to their intended destination and then reporting their arrival to Customs. This was possible under the previously existing law and regulations which permitted the report of arrival to be delayed for as long as 24 hours after arrival in the U.S. The remaining provisions of the Anti-Drug Abuse Act of 1986 will be the subject of other Federal Register documents.

Comments

Before adopting these interim regulations as a final rule, consideration will be given to any written comments (preferably in triplicate) timely submitted. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on normal business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Custom Service Headquarters, Room 2324, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

Inapplicability of Notice and Delayed Effective Date Requirements

Inasmuch as these amendments implement a statutory change which is already effective and because of critical drug interdiction requirements in southern Florida, it is deemed to be in the public interest to make the regulatory changes as soon as possible. Accordingly, the normal advance notice and public procedure are unnecessary pursuant to 5 U.S.C. 553(b)(B). For the same reasons, pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

Executive Order 12291

Because this document will not result in a "major rule" as defined in E.O. 12291, a regulatory impact analysis is not required.

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required for interim regulations, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

Drafting Information

The principal author of this document was Arnold L, Sarasky, Regulations Control Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

Lists of Subjects

19 CFR Part 141

Cargo vessels, Coastal zone, Customs duties and inspection, Fishing vessels, Freight, Harbors, Imports, Maritime carriers, Reporting and recordkeeping requirements, Seamen, Vessels and Yachts.

Amendments to the Regulations

Part 4, Customs Regulations (19 CFR Part 4), is amended as set forth below:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general authority for Part 4 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (Gen. Hdnote. 11), 1624, and 46 U.S.C. 2, 3.

2. Part 4 is amended by removing footnote 3.
3. Section 4.2(a) is revised to read as follows:

§ 4.2 Reports of arrival of vessels.

(a) The report of arrival of vessels, required by § 433, Tariff Act of 1930, as amended (19 U.S.C. 1433), except as prescribed in § 4.2a of this chapter, or as supplemented in local instructions issued by the district director and made available to interested parties by posting in Customs offices, publication in a newspaper of general circulation, and other appropriate means, shall be made by any means of communication to the district director or to a Customs officer assigned to board a vessel. The Customs officer may require the production of any documents or papers deemed necessary for the proper inspection/examination of a vessel, cargo, passengers, or crew.

* * * * * * *

4. Part 4 is amended by adding a new § 4.2a to read as follows:

§ 4.2a Small vessel reporting of arrival, Miami District.

(a) *Scope.* This section imposes special requirements for the report of arrival from any foreign port or place by small vessels whose intended destination is at a point within the jurisdiction of the Miami, Florida, Customs District, as defined in § 101.3(b) of this chapter. The operators of small vessels will be required to immedi-

ately report their arrival in the U.S., as prescribed by § 4.2(a) of this chapter, or as supplemented in local instructions issued by the district director and made available to interested parties by posting in Customs offices, publication in a newspaper of general circulation within the Miami District, and other appropriate means, by proceeding to locations designated by the District Director of Customs, Miami, Florida, prior to proceeding to their destination. The report will be made through a clearly marked Customs telephone. After securing some information from the person reporting, the Customs officer responding to the report of arrival will instruct the vessel operator that the vessel may proceed or that further action, which may include inspection/examination at another location, is required.

(b)*Definitions.* For the purposes of this section:

(1) *"Foreign port or place"* includes a hovering vessel as defined in § 401(B), Tariff Act of 1930, as amended, 19 U.S.C. 1401(k), and any point in the Customs waters beyond the territorial sea or in the high seas at which a vessel arriving in a port or place in the U.S. has received merchandise.

(2) *"Small vessel"* includes any vessel of less than 5 net tons, and any private pleasure vessel, regardless of displacement.

(3) *"Arrival of a vessel"* occurs when a small vessel comes to rest within the waters of the Miami District, whether at anchor or at a dock, in any harbor or other location.

(c) *Vessels entering the southern and western portions of the Miami District.* The operators of vessels arriving from a foreign port or place with an intended destination at a point south of the entrance to Biscayne Bay known as Broad Creek, which is north of Key Largo between Swan Key and Broad Key, or that portion of the west coast of the State of Florida within the Miami Customs District as described in § 101.3(b), of this chapter, shall immediately report their arrival by the use of special clearly marked Customs telephones provided for that purpose, at the Customs designated location in the Florida Keys nearest to their intended destination point, before proceeding to their destination point.

(d) *Vessels entering the northern portion of the Miami District.* The operators of vessels arriving from a foreign port or place with an intended destination at or north of the entrance to Biscayne Bay known as Broad Creek, which is north of Key Largo and between Swan Key and Broad Key, shall immediately report their arrival by the use of special clearly marked Customs telephones provided for that purpose, at the Customs designated location nearest the point at which the Biscayne Bay may be first entered or the intracoastal waterway may be first entered through a "cut", "channel", or "inlet", before proceeding to their destination point. This provision shall apply to vessels whose intended destination is on the Florida mainland or the barrier islands east of the intracoastal waterway.

(e) *Penalties.*

(1) *Civil penalty.* The master or person in charge of any vessel who fails to report arrival as required under this section is liable for a civil penalty of $5,000 for the first violation, and $10,000 for each subsequent violation. Any vessel used in connection with any such violation is subject to seizure and forfeiture.

(2) *Criminal penalty.* In addition to the civil penalty prescribed for violation of this section, the master or person in charge of any vessel who intentionally fails to report arrival as required by this section is liable, upon conviction, for a fine of not more than $2,000 or imprisonment for 1 year, or both. If the vessel is found to have, or to have had, on board any merchandise the importation of which is prohibited, such individual is liable for an additional fine of not more than $10,000 or imprisonment for not more than 5 year, or both.

(3) *Additional civil penalty.* If any merchandise, other than sea stores, is imported or brought into the U.S. aboard a vessel which has failed to report arrival as prescribed by this section, the master or person in charge of the vessel shall be liable for a civil penalty equal to the value of the merchandise, and the merchandise may be seized and forfeited, unless properly entered by the importer or consignee. If any of the merchandise consists of a controlled substance listed in § 584, Tariff Act of 1930, as amended 19 U.S.C. 1584, the penalties prescribed in that section shall apply.

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: December 14, 1987.
JOHN P. SIMPSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, December 21, 1987 (52 FR 48194)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Parts 6 and 113

PROPOSED CUSTOMS REGULATIONS AMENDMENTS CONCERNING ACCESS TO CUSTOMS SECURITY AREAS AT AIRPORTS

AGENCY: Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations to provide that employers of persons requiring access to Customs security areas at airports would be required to post a bond in which they specifically agree that both they and their covered employees will comply with the regulations applicable to those areas and to pay liquidated damages for the failure to do so. The provisions are being proposed because Customs experience in the year since the airport security area program was introduced has revealed that there have been frequent violations. Employees ordered out of security areas because of lack of clearance have later returned without having obtained clearance. Further, statements made by employers concerning background checks of their employees have proven to be inaccurate. The proposed provisions would permit the approved identification card, strip or seal to be removed from employees because of bond insufficiency and would permit the district director to waive the bond surety requirement for the period of the temporary identification card. The document also clarifies that law enforcement and government officials that are exempt from the Customs security area identification application requirements are not required to submit an Airport Customs Security Area Bond.

DATES: Comments must be received on or before February 26, 1988.

ADDRESS: Written comments (preferably in triplicate) may be submitted to and inspected as the Regulations Control Branch, Customs Service Headquarters, Room 2324, 1301 Constitution Avenue, NW., Washington, D.C. 20229. Comments relating to the information collection aspects of the proposed rule may be addressed to Cus-

toms, as noted above, and also the Office of Information and Regulatory Affairs, Attention: Desk Officer for U.S. Customs Service, Office of Management and Budget, Washington, D.C. 20503.

FOR FURTHER INFORMATION CONTACT: Operational aspects: John O'Malley, Office of Inspection Enforcement Liaison (202-566-2140). Bond aspects: William Rosoff, Drawback and Bonds Branch (202-566-5856).

SUPPLEMENTARY INFORMATION:

Background

Interim regulations, published as T.D. 86-12 in the Federal Register on February 3, 1986 (51 FR 4161), provided for the establishment of an identification system for all employees whose duties required access to Customs security areas at airports handling international air commerce. Federal, and uniformed state and local law enforcement personnel were exempted. These regulations, which are set forth in § 6.12a, Customs Regulations (19 CFR 6.12a), provided for the establishment of a "Customs security area". They also required that affected employees apply for a Customs approved identification card, or a strip or seal to be affixed to existing identification cards once an authorized official of the employer attested that background checks of employment history of their employees had been conducted or that one was not required because the employee had been hired before November 1, 1984.

After analysis of public comments received in response to publication of the interim regulations, several changes were made. These included changing the employment commencement date from which a background investigation would be required of an employee to November 1, 1985, so that it would coincide with the date which the Federal Aviation Administration uses in administering related requirements. Further, the requirement for law enforcement personnel to apply for an exemption was eliminated. They need only request the issuance of an approved identification card with strip or seal affixed thereto. Some comments, including one urging severe penalties for violations of the new security requirements, were considered but not adopted. A final rule, incorporating the adopted changes, was published as T.D. 86-174 in the Federal Register of September 12, 1986 (51 FR 32448).

Customs experience since then has revealed that there are still frequent violations of the security area provisions. We have noted that some people ordered out of the security areas because they do not have clearance, returned later without having obtained that clearance. Further, statements made by employers regarding background checks of persons requiring access to the security areas have proven to be inaccurate. A national audit of the employee files of approximately 1000 persons subject to these provisions has revealed that the references of almost 50 percent of new employees were not

verified. In some instances, the management of ground service companies and others have shown an indifference to these matters. We have concluded that there is currently no effective enforcement mechanism for the security area regulations and that an appropriate bond which provided for the assessment of liquidated damages for violations is necessary to encourage compliance. We have also found that employers are not timely advising Customs of employees who no longer require access to security areas.

To correct these problems, it is proposed to amend Parts 6 and 113, Customs Regulations (19 CFR Parts 6 & 113), regarding the airport security area program. Under the proposal, employers will be required to periodically file a summary report of these employee changes. Employers will also be required to advise their employees of the regulations relative to Customs airport security areas, to require that their employees familiarize themselves with those provisions and insure that all their employees comply therewith. The failure to comply with the regulations would be considered as a default of the conditions of the employer's bond and would make the employer liable for liquidated damages.

If the applicant's employer has on file with Customs a Customs Form 301 containing the bond conditions set forth in §§ 113.62, 113.63, or 113.64, Customs Regulations (19 CFR 113.62, 113.63, 113.64), relating to importers, brokers, custodians of bonded merchandise, or international carriers, the application for an approved identification card, strip or seal would not need to be accompanied by any new bond. If there is no such bond, the application would have to be supported by an Airport Customs Security Area Bond, as set forth in new Appendix A of Part 113, Customs Regulations (19 CFR Part 113).

The document clarifies that law enforcement and governmental officials that are exempt from the identification application requirements need not submit an Airport Customs Security Area Bond. It also corrects the form number of the fingerprint card cited in § 6.12a(c) from Standard Form 87 to form FD-258.

Comments

Before adopting this proposal, Customs will give consideration to any written comments (preferably in triplicate) timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4) and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Customs Service Headquarters, Room 2324, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

E.O. 12291 and Regulatory Flexibility Act

This document does not meet the criteria for a "major rule" within the meaning of E.O. 12291. Accordingly, Customs has not prepared a regulatory impact analysis. Since the proposal merely provides for a method of enforcing previously existing procedures, it is certified, pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.),* that the proposed amendments, if adopted, will not have a significant economic impact on a substantial number of small entities. Accordingly, they are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Paperwork Reduction Act

This document proposes to modify the information collection requirements of the regulations concerning access to Customs security areas at airports. Those regulations were submitted to the Officer of Management and Budget (OMB) under the Paperwork Reduction Act of 1930 (44 U.S.C. 3501) and approved under control number 1515–0152. This document has been submitted to OMB for review and comment under that Act pursuant to 44 U.S.C. 3504(h). Public comments relating to the information collection aspects of the proposal should be addressed to the Office of Information and Regulatory Affairs, Attention: Desk Officer for U.S. Customs Service, Office of Management and Budget, Washington, D.C. 20503. A copy of the comments to OMB should also be sent to Customs at the address set forth in the ADDRESS portion of this document.

Drafting Information

The principal author of this document was Arnold L. Sarasky, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

List of Subjects

19 CFR Part 6

Air carriers, Aircraft, Airports, Cuba, Customs duties and inspection, Freight, and Imports.

19 CFR Part 113

Air carriers, Customs duties and inspection, Exports, Freight, Imports, and Surety bonds.

Proposed Amendments

It is proposed to amend Parts 6 and 113, Customs Regulations (19 CFR Parts 6 and 113), as set forth below:

PART 6—AIR COMMERCE REGULATIONS

1. The authority citation for Part 6 would continue to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (Gen. Hdnote. 11), 1624, 1644, 49 U.S.C. App. 1474, 1509.

2. It is proposed to amend § 6.12a by redesignating paragraph (b) as (b)(1) and adding a new paragraph (b)(2), by revising paragraph (c), by adding a sentence at the end of paragraph (d), by redesignating paragraph (j)(1)(vi) as paragraph (j)(1)(vii), by adding a new paragraph (j)(1)(vi), by revising redesignated paragraph (j)(1)(vii), and by adding a sentence at the end of the introductory text of paragraph (k), to read as follows:

§ 6.12a Access to Customs security areas.

* * * * * * *

(b)(1) * * *

(b)(2) Employers operating in Customs airport security areas shall advise all their employees of the provisions of the Customs regulations relative to those areas, require that their employees familiarize themselves with those provisions and insure that all their employees comply therewith. The failure to comply with these regulations shall be considered as a default of the conditions of the employers bond, as hereafter specified, and shall make the employer liable for liquidated damages as specified in its bond.

(c) An application for an approved identification card, strip or seal as required by this section, shall be filed by the applicant with the district director on Customs Form 3078 and shall be supported by the bond of the applicant's employer on Customs Form 301 containing the bond conditions set forth in §§ 113.62, 113.63, or 113.64 of this chapter, relating to importers, brokers, custodians of bonded merchandise, or international carriers. If the applicant's employer is not the principal on a Customs bond on Customs Form 301 for one or more of the activities stated above, the application shall be accompanied by an Airport Customs Security Area Bond, as set forth in Appendix A of Part 113 of this chapter. The application and bond requirement applies to all employees, regardless of the length of their employment. For employees hired on or after November 1, 1985, an authorized official of the employer shall attest in writing that a background check has been conducted on the applicant, to the extent allowable by law. The background check shall include, at a minimum, references and employment history, to the extent necessary to verify representations made by the applicant relating to employment in the preceding 5 years. For any employee hired before November 1, 1985, the authorized official of the employer need only attest to the fact that the employee was hired before that date. The authorized official of the employer shall attest that to the best of his knowledge, the applicant meets the conditions

necessary to perform functions associated with employment in the Customs security area. The fingerprints of the applicant may be required on fingerprint card form FD–258 at the time of the filing of the application. Proof of citizenship or authorized residency, and a photograph may also be required. In addition, the application may be investigated by Customs and a report prepared concerning the character of the applicant. Records of background investigations conducted by employers must be retained and made available upon request by the district director for a period of 1 year following cessation of employment by affect employees.

(d) * * * An Airport Customs Security Area Bond is not required.

* * * * * * *

(j)(1) * * *

(vi) The bond required by paragraph (c) of this section is determined to be insufficient in amount or lacking sufficient sureties, and a satisfactory new bond with good and sufficient sureties is not furnished within a reasonable time.

(vii) The employee no longer requires access to the Customs security area for an extended period of time at the airport of issuance because of a change in duties, termination of employment, or other reason. In this instance the employer shall notify the district director in writing, at the time of such change, and shall return the strip or seal to Customs. The notification shall include information regarding the disposition of the approved identification card of the employee who no longer requires access. A summary of such information shall be filed quarterly or at such shorter interval established by the district director. If the employee returns to duties in the Customs security area at the airport for the same employer within 1 year, a Customs Form 3078, as required in paragraph (d) of this section, need not be submitted.

* * * * * * *

(k) * * * Surety on the bond required by paragraph (c) of this section may be waived in the discretion of the district director, but only for the period of the temporary identification card and authorized renewals of the temporary identification card.

* * * * * * *

PART 113—CUSTOMS BONDS

1. The authority citation for Part 113 would continue to read as follows:

Authority: 19 U.S.C. 66, 1623, 1624. Subpart E also issued under 19 U.S.C. 1484, 1551, 1565.

2. It is proposed to amend § 113.62 by redesignating paragraph (i) as paragraph (j) and by adding a new paragraph (i) to read as follows:

§ 113.62 Basic importation and entry bond conditions.

* * * * * * *

(i) *Agreement to comply with Customs Regulations applicable to Customs security areas at airports.* If access to the Customs security areas at airports is desired, the principal (including its employees, agents, and contractors) agrees to comply with Customs Regulations in this chapter applicable to Customs security areas at airports. If the principal defaults, the obligors (principal and surety, jointly and severally) agree to pay liquidated damages of $1000 for each default or such other amount as may be authorized by law or regulation.

3. It is proposed to amend the first sentence of § 113.62(j)(1), as redesignated, by removing "(a) or (g)" and inserting, it its place, "(a), (g) or (i)".

4. It is proposed to amend § 113.63 by redesignating paragraphs (f) and (g) as paragraphs (g) and (h), respectively, and by adding a new paragraph (f) to read as follows:

§ 113.63 Basic custodial bond conditions.

(f) *Agreement to comply with Customs Regulations applicable to Customs security areas at airports.* If access to Customs security areas at airports is desired, the principal (including its employees, agents, and contractors) agrees to comply with the Customs Regulations in this chapter applicable to Customs security areas at airports. If the principal defaults, the obligors (principal and surety, jointly and severally) agree to pay liquidated damages of $1000 for each default or such other amount as may be authorized by law or regulation.

5. It is proposed to amend § 113.64 by redesignating paragraph (d) as paragraph (e) and by adding a new paragraph (d) to read as follows:

§ 113.64 International carrier bond conditions.

* * * * * * *

(d) *Agreement to comply with Customs Regulations applicable to Customs security areas at airports.* If access to Customs security areas at airports is desired, the principal (including its employees, agents, and contractors) agrees to comply with the Customs Regulations in this chapter applicable to Customs security areas at airports. If the principal defaults, the obligors (principal and surety, jointly and severally) agree to pay liquidated damages of $1000 for each default or such other amount as may be authorized by law or regulation.

6. It is proposed to further amend Part 113 by adding, as Appendix A, the bond format hereafter noted for the Airport Customs Security Area Bond prescribed in § 6.12a(c) of this chapter.

APPENDIX A—AIRPORT CUSTOMS SECURITY AREA BOND

Airport Customs Security Area Bond

______________________________________ (name of principal)

of ____ and

____ (name of surety)

of ____

are held and firmly bound unto the United States of America in the sum of ____ dollars ($__________), for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

WITNESS our hands and seals this ___ day of __________, 19__.

WHEREAS, the principal (including the principal's employees, agents, and contractors) desires access to Customs airport security areas located at ____________________________________ Airport during the period of one year beginning on the _______ day of __________, 19__, and ending on the _______ day of __________, 19__, both dates inclusive;

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH THAT—

The principal agrees to comply with the Customs Regulations applicable to Customs security areas at airports.

If the principal defaults on the condition of this obligation, the principal and surety, jointly and severally, agree to pay liquidated damages of $1000 for each default or such other amount as may be authorized by law or regulation.

SIGNED, SEALED, AND DELIVERED IN THE PRESENCE OF—

Name	Address	
Name	Address	Principal (SEAL)
Name	Address	
Name	Address	
Name	Address	Surety (SEAL)
Name	Address	

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: October 23, 1987.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, December 28, 1987 (52 FR 48833)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

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Edward D. Re

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Decisions of the United States Court of International Trade

(Slip Op. 87-131)

BANTAM TRAVELWARE, DIVISION OF PETER'S BAG CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 85-11-01552 (86-01-00038)

[Judgment for defendant.]

(Decided December 3, 1987)

Siegel, Mandell & Davidson, P.C. (Judith M. Barzilay and *Brian S. Goldstein)* for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Civil Division, Department of Justice (*James A. Curley*) for the defendant.

OPINION

TSOUCALAS, *Judge:* This action is before the Court for decision after trial. The subject merchandise consists of luggage with braided material either in the handles or tie-straps. Plaintiff challenges the Customs Service's classification of its importations as luggage not "in part of braid" pursuant to item 706.41, TSUS. In order to prevail, plaintiff must prove, *see* 28 U.S.C. § 2639(a)(1) (1982), that the goods are "in part of braid" pursuant to item 706.34, TSUS.

As explained in an earlier opinion,[1] the Court must determine whether the luggage contains a "significant quantity" of braid. *Bantam,* 11 CIT at ——, Slip. Op. 87-22 at 3-4 (citing General Headnote 9(f)(iv), TSUS). A significant quantity is synonymous with a commercially significant quantity. *Id.* at ——, Slip. Op. 87-22 at 3 n.1 (quoting Tariff Classification Study, Submitting Report, November 15, 1960 at 14).

TRIAL

At trial, it was established that braided material is employed in the luggage handles in the form of a sheath surrounding a core of non-braided material. The outer surface of the handle is formed by

[1] The reader is urged to consult this Court's opinion in *Bantam Travelware, Div. of Peter's Bag Corp.* v. *United States,* 11 CIT ——, Slip. Op. 87-22 (Feb. 27, 1987) (denying cross-motions for summary judgment) for a more complete exposition of the background of this case.

a vinyl or textile material which completely covers the braided core. In the tie-tapes (tie-straps), which hold the contents of the luggage in place, braided material covers a rubber or spandex elastomer. It is undisputed that the use of braid is not advertised by plaintiff to consumers and that the presence of braid is not observable to the naked eye.

Plaintiff offered the testimony of several witnesses in support of its contention that the braid is a commercially significant addition to its luggage. For example, Abraham Kleinman, Treasurer of Peter's Bag Corporation, testified that plaintiff began to incorporate braided materials into its luggage because:

> braid was stronger than any wadding you could put into a handle. Braid had features which we could talk up to buyers. Not only was it stronger but, in the handle, it gave it softness, it gave it form, and we decided we were going to use braid in our handles, even though it cost more, as a selling feature.
>
> We also decided we wanted to have braided tie tapes because it laid better in the bag when you covered your clothes or you tied it over your clothes. It was stronger, and your clothes were in place, and we decided to use it.

Trial Transcript at 22 (hereinafter "Tr. at ——"). Mr. Kleinman also explained that plaintiff sought to take advantage of the lower tariff duty rates on luggage containing braided materials. *Id.* at 26. The witness further testified that the use of braid was expensive and therefore a decision was made not to use braid in both the handles and the tie-tapes within a given style of luggage. *Id.* at 24–25.

Defendant's witnesses denied that the braid is a commercially significant feature of the luggage. Kevin Gorman, a National Import Specialist for Customs, testified that there was no discernible advantage to the use of braid in plaintiff's importations. For example, he explained that braided elastic tie-tapes perform as well as non-braided elastic tie-tapes. *Id.* at 188. Richard Lutzer, Textile Branch Chief of the Customs Laboratory, who testified as an expert on textiles and the use of textiles in commercial products, explained that a braided luggage handle would offer the same comfort and have the same shape as a non-braided handle. *Id.* at 234–35.

The Parties' Claims

Plaintiff contends that to be "commercially significant the braid must be functional or it must add to the saleability of the luggage." *Plaintiff's Post-Trial Brief* at 3–4. Briefly stated, plaintiff claims that it has proven that braid in the luggage handles and tie-tapes performs "functions simultaneous with and directly related to the overall purpose of the luggage itself and because the presence of the braid in the handles and the tie-tapes adds to the saleability of the luggage to the consumer." *Id.* at 27. Although consumers are unaware of the presence of the braid, plaintiff alleges that braid improves the luggage, thereby enhancing its marketability.

Defendant argues that the "advantages claimed for the braided handle or tie strap do not enhance the function and operation of the luggage, are not advertised by Peter's Bag, are not known by consumers, and are superfluous." *Defendant's Post-Trial Brief* at 7. Articles of luggage with braided features perform the same function in the same manner as those without braided features. *Id.* at 10–11.

Defendant suggests that plaintiff began to construct certain importations with braid in an effort to avoid quota restraints and to benefit from lower duty rates on luggage in part of braid. In this regard, defendant notes that the incorporation of braided materials into the subject merchandise roughly coincided with the institution of the aforementioned quota. Furthermore, defendant stresses that the decision to employ braid either in the luggage handles or tie-straps, but not in both, undermines plaintiff's assertion that the features at issue are commercially significant. According to defendant, written communications regarding the fabrication of the goods, which were directed to plaintiff's representatives in Korea and Taiwan, make no mention of the commercial benefits of braid, and reveal plaintiff's intent to employ only enough braid to obtain favorable tariff treatment. *See id.* at 3–4.

THE "IN PART OF" PROVISION

A bi-partite test has been developed with reference to mixtures of benzenoid chemicals to assess whether such mixtures should be considered "in part of" a subsidiary ingredient. Under the "functional-quantitative" test, lesser ingredients may properly control the classification of the mixture as a whole where they play a direct role in the primary function of the mixture. *Compare Northam Warren Corp.* v. *United States,* 60 CCPA 117, 120–21, C.A.D. 1092, 475 F.2d 647, 650 (1973) *with United States* v. *Aceto Chem. Co.,* 64 CCPA 78, 83, C.A.D. 1186, 553 F.2d 685, 688–89 (1977). Alternatively, a mixture may be said to be "in part of" the lesser ingredient where that chemical is present in an amount which has independent commercial significance. *See F.W. Myers & Co.* v. *United States,* 85 Cust. Ct. 83, 86, C.D. 4876 (1980).

In *Genender Wholesale* v. *United States,*[2] however, the court failed to rely explicitly on the functional-quantitative analytic framework in evaluating a claim of commercial significance. The issue presented in *Genender* was whether brass watch cases, coated with nickel, which in turn were plated electrolytically with approximately two milligrams of gold, "contained"[3] gold. The court premised its conclusion that gold was present in a commercially significant amount on the following findings:

(a) that the presence of a yellow color imparted a quality of "richness" which enhanced saleability of the watch cases;

[2] 1 CIT 278, 520 F. Supp. 278 (1981), *aff'd.* 69 CCPA 146, 676 F.2d 672 (1982). The Court of Customs and Patent Appeals adopted the lower court opinion except for "references therein to the cost of plating as affecting the conclusion of commercial significance." *Genender*, 69 CCPA at 147, 676 F.2d at 672.

[3] The terms "in part of" and "containing" have identical meanings. *See* General Headnote 9(f)(iv), TSUS.

(b) that electroplating of gold was the only commercial means by which the desired yellow color could be imparted to the watch cases and application of a lesser quantity of gold would not produce that color;

(c) that the presence of gold served to inhibit tarnish and rust;

(d) that the use of gold in a similar manner was standard in the commercial costume jewelry industry; and,

(e) that the cost of applying the gold represented 25–30% of the value of the imported article.

See Genender, 1 CIT at 281–82, 520 F. Supp. at 280–81. It is also useful to note that the trial court characterized the evidence supporting its findings as unrebutted. *See id.* at 280, 520 F. Supp. at 280.

Discussion

The Court is guided in its analysis of a claim of commercial significance by the approach adopted in *Genender Wholesale.* Accordingly, in the context of the present case, the Court directs its attention to the evidence adduced regarding the commercial utility of the quantity of braided material in the subject merchandise, its effect on saleability, and the relevant trade's recognition of the use of braid in the fabrication of the luggage. After consideration of all of the evidence and after evaluation of the credibility of the witnesses offered by both parties, the Court is persuaded that plaintiff has failed to prove that braided materials are present in a commercially significant quantity in the subject importations.

Plaintiff has ascribed a number of benefits to the use of braid in the subject merchandise, including improvements in strength, comfort, flexibility, and elasticity. Defendant's witnesses, however, offered highly credible testimony rebutting plaintiff's assertions with regard to the advantages of braided construction of both the luggage handles and tie-tapes. In substance, they testified that the utility of luggage, with or without the braided features at issue here, would be the same. They also testified that consumers would not identify the presence of braid nor would they perceive any beneficial effects attributable to the use of braid.

Plaintiff has failed to explain precisely how the allegedly superior physical characteristics of braid translate into any advantage of demonstrable commercial significance that is desired or recognized by consumers. Testimony regarding the performance of braid in laboratory tests, or that braided features "work better," Tr. at 102 (testimony of Robert Beaulieu, Professor of the Fashion Institute of Technology), is insufficient to establish that the use of braid produces any meaningful advantage relative to the actual performance or appearance of the product. For example, plaintiff insists that braid imparts qualities such as compressibility or softness to the handles, and elasticity to the tie-tapes. Notwithstanding those claims, there is credible evidence in the record indicating that the "feel" of the

handles, and the stretchability of the tie-tapes, are influenced primarily by the inner handle core and the elastomer, respectively, and not by the presence of braid.

The Court is also unconvinced that plaintiff has proven that the use of braided materials adds to the saleability of the luggage. There is no proof that plaintiff is fulfilling a consumer preference in using braided materials in its luggage or even that consumers are aware of the use of such materials. Despite generalized assertions that the presence of braid contributes to "product integrity and product appearance" and therefore "makes it easier to sell" the product, Tr. at 67 (testimony of Stephen Gardy, Vice President of Peter's Bag Corporation), there is no tangible indication of increased sales of braided luggage or of a recognized consumer demand for such luggage.

With reference to the trade recognition issue, the Court finds the evidence to be inconclusive. While testimony was offered on behalf of plaintiff that other manufacturers employed braided materials in their luggage,[4] it is significant that neither Mr. Gorman nor Mr. Lutzer, despite their knowledge of the industry, was aware of any commentary regarding the alleged benefits of braided construction. In any event, plaintiff's proffered evidence on this issue does not overcome its failure to adequately demonstrate the commercial utility of braid as used in the instant importations.

The Court believes that plaintiff's reliance on the result in *Genender* is misplaced given the factual distinctions between that case and the instant one. In *Genender*, the trial court apparently found the uncontroverted testimony regarding increased saleability and trade recognition to be persuasive. Furthermore, the importer, in employing the only commercially practical method of applying gold to the watch cases, was ostensibly fulfilling a clearly demonstrated consumer preference for yellow watch cases. In contrast, for the reasons outlined earlier, plaintiff's offer of proof in this case falls far short of that made in *Genender*.

In concluding that plaintiff has not proven its claim of commercial significance, the Court cautions that it does not rely on defendant's allegation regarding the alleged motive for the incorporation of braided material into the luggage. It has long been recognized that "an importer has the right to fashion his merchandise so that it shall be assessed with duty at the lowest rate." *Michaelian & Kohlberg, Inc.* v. *United States*, 22 CCPA 551, 557 (1935). Plaintiff's burden in this case is to prove that a material is present in significant quantity. That burden is not affected by its motive in constructing its goods in a particular way.

Finally, the Court does not interpret *Genender* as requiring that a feature be visible in order to be considered commercially signifi-

[4] Joseph Berman, General Manager of Henry Rosenfeld Luggage Company ("Rosenfeld"), testified that his company, as well as others, imported braided luggage. In fact, he claimed that, on a particular product line, Rosenfeld only employed braided construction. This assertion was undermined on cross-examination, however, when he was confronted with a particular article from that luggage line which did not contain any braid. He explained this discrepancy by contending that the article had not been made to specification. *See* Tr. at 131, 133–34.

cant. Nor does the instant decision impose such an inflexible rule. Under certain circumstances, a feature's visibility may facilitate the attempt to prove its effects on saleability. The lack of visibility, however, should not, standing alone, defeat a properly supported claim of commercial significance.

CONCLUSION

Plaintiff has failed to prove, by a preponderance of the credible evidence, that the subject importations are "in part of braid" within the meaning of the Tariff Schedules. The Court is therefore compelled, in this case, to sustain the classification of the merchandise by the Customs Service.

(Slip Op. 87–132)

SCHOTT OPTICAL GLASS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81–01–00030

Before CARMAN, *Judge.*

[Judgment for defendant.]

(Decided December 7, 1987)

Fitch, King & Caffentzis (Richard C. King and *Peter Fitch* at trial and on the briefs) for plaintiff.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, Department of Justice, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office *(John J. Mahon* at trial and on the brief) for defendant.

MEMORANDUM OPINION

CARMAN, *Judge:* This case is before the Court pursuant to a remand ordered by the United States Court of Appeals for the Federal Circuit. *See Schott Optical Glass, Inc.* v. *United States,* 7 CIT 36, 587 F. Supp. 69 (1984), *rev'd and remanded,* 750 F.2d 62 (Fed. Cir. 1984). *(Schott II).* At issue is the proper tariff classification of seven types of glass which were described in invoices of entry papers for the merchandise as follows: KG 4, WG 345, UG 1, UG 5, UG 11, RG 9, and RG 830. All of the entered goods were classified, by the United States Customs Service (Customs), as "other optical glass" under item 540.67 of the 1980 Tariff Schedules of the United States (TSUS). Customs assessed the duty at the rate of 23.1% *ad valorem.*

Plaintiff, Schott Optical Glass, Inc., (Schott) contends the glass type WG 345 should have been classified under item 542.42 as ordinary glass and assessed a duty rate of 0.5 cents per pound. Schott also urges glass types UG 1, UG 5, UG 11, RG 9, RG 830, and KG 4 should have been classified under item 542.92 as "colored or special

glass" and assessed a duty rate of 0.6 cents per pound plus 2.4% *ad valorem.*

Defendant United States (Government) argues if the merchandise is not classified as "other optical glass" under item 540.67 TSUS, it should be classified as claimed by Schott. As an affirmative defense, however, the Government contends that the merchandise did not meet the packing requirements of headnote 4[1] and therefore should have been denied entry and returned to Custom's custody pursuant to 19 C.F.R. § 141.113(b) (1980).[2]

The Government also asserts a counterclaim the applicability of which would arise in the event the merchandise is found to be properly classified under either of the claimed provisions of plaintiff. The Government essentially argues that since the entries occurred several years ago, Schott might be unable to return the merchandise to the custody of Customs as required by the regulations. The Government therefore requests liquidated damages in the sum of $23,117.25, the value of the merchandise. The Government asserts it is also entitled to liquidated damages in the amount of the estimated duties under the claimed provisions.

On May 10, 1982, the trial court in *Schott II* issued an order denying, without prejudice, Schott's motion to dismiss the Government's counterclaim as premature. The trial court ruled the issue would be moot if the court sustained the Government's classification. In *Schott II,* the trial court indeed dismissed the counterclaim as moot. *See* 7 CIT at 42, 587 F. Supp. at 73. In light of the Court's holding to follow, the Court does not reach these issues.

The Court now turns its attention to the relevant tariff provisions contained in Schedule 5, Part 3, TSUS (1980). These provisions are set forth as follows:

[Classified under:]

Subpart A:

* * * * * * *

Optical glass in any form, including blanks for spectacle lenses and for other optical elements; non-optical-glass blanks for corrective spectacle lenses; synthetic optical crystals in the form of ingots, segments of ingots, sheets, or blanks for optical elements; all the foregoing not optically worked; polarizing material, in plates or sheets, not

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[1] Schedule 5, Part 3, Subpart B, Headnote 4, TSUS (1980) is set forth as follows:

4. Glass provided for in items 542.11 through 542.98, imported in any shipment in quantities over 50 square feet of the same size and thickness, shall be denied entry unless—

(i) packed in units containing, as nearly as the particular size permits, 50 square feet, or multiples thereof, or

(ii) > packed in units containing multiples of the number of sheets of the same size and thickness which would be contained in a unit if packed to contain, as nearly as such size permits, 50 or 100 square feet, or

(iii) otherwise packed in a manner which conforms to the packing practices of the domestic glass industry as determined and published from time to time by the Secretary of the Treasury

[2] The Government argues that in the event this Court should agree with plaintiff the merchandise was properly classified under the alternative provisions claimed, the provisions of headnote 4 would be applicable since they cover all glass provided for in items 542.11 through 542.98.

cut to shape or mounted for use as polarizing optical elements:

* * * * * * *

540.67 Other optical glass and synthetic optical crystals; polarizing material .... 23.1% *ad val.*

[Claimed under:]

Subpart B:

* * * * * * *

Glass (whether or not containing wire netting), in rectangles, not ground, not polished and not otherwise processed, weighing over 4 oz. per sq. ft.:

* * * * * * *

Other, including blown or drawn glass, but excluding pressed or molded glass:

Ordinary glass:

542.42 Weighing over 28 oz. per sq. ft.:
Not over 2-2/3 sq. ft. in area .... 0.5¢ per lb.

[And Claimed under:]

Colored or special glass:

* * * * * * *

542.92 Weighing over 28 oz. per sq. ft.:
Not over 2-2/3 sq. ft. in area .... 0.6¢ per lb.
2.4% *ad val.*

The trial court, in *Schott II,* ruled the common meaning of the term "optical glass" had already been ascertained in *Schott Optical Glass, Inc.* v. *United States,* 82 Cust. Ct. 11, C.D. 4783, 468 F. Supp. 1318 (1979), *aff'd and reh'g denied,* 67 CCPA 32, C.A.D. 1239, 612 F.2d 1283 (1979) (*Schott I*). In *Schott I,* the court of appeals held the term "optical glass," as used in item 540.67, encompassed glass which was: "(a) Very high quality, (b) used for optical instruments, and (c) capable of performing an optical function * * *." 67 CCPA at 33, 612 F.2d at 1285. Thus, since *Schott I* had ascertained the common meaning of "optical glass" as used in the statute, the trial court in *Schott II* ruled the definition of "optical glass" in *Schott I* was *stare decisis.* The trial court in *Schott II* also concluded this definition was controlling until a change in the statute necessitated a change in meaning or until it was shown the prior decision was clearly erroneous. *Schott II,* 7 CIT at 38-39, 587 F. Supp. at 71. Accordingly, the plaintiff in *Schott II* was precluded from relitigating or offering any evidence as to that issue. The classification of the merchandise under item 540.67 TSUS was sustained, and the action was dismissed.

Plaintiff Schott then appealed from the trial court's judgment in *Schott II* which sustained the Government's classification. In remanding, the Court of Appeals for the Federal Circuit held Schott should have been permitted to introduce evidence showing the prior decision of the Court of International Trade in *Schott I,* which upheld the classification of similar glass, was clearly erroneous. *Schott II,* 750 F.2d at 65.

The court of appeals in *Schott II,* citing *United States* v. *Stone & Downer Co.,* 274 U.S. 225 (1927), pointed out in a Customs classification case that a determination of fact or law, with respect to one importation, is not *res judicata* as to another importation of the same merchandise by the same party. The court indicated the opportunity to relitigate applies to both questions of construction of the classification statute as well as to questions of fact regarding the merchandise. The court stated that "[u]nder *Stone & Downer* the doctrine of *res judicata*—which bars litigation by the same parties of the same issue previously adjudicated * * * would not bar Schott from relitigating the meaning of 'optical glass' or the classification of its filters in this case within that category."[3] *Schott II,* 750 F.2d at 64 (citation omitted).

While the court of appeals in *Schott II* rejected the trial court's conclusion that *stare decisis* precluded Schott from offering further evidence, the court alluded to the well-recognized exception to *stare decisis* which permits a court to reexamine and overrule a prior decision that is clearly erroneous. The court asserted the issue was "not whether the arguments are the same but whether the new evidence would show that the rejection of those arguments in the prior case was clearly erroneous." *Schott II,* 750 F.2d at 64. Thus, while concluding Schott should have been allowed to offer additional evidence to undermine the prior decision in *Schott I,* the court of appeals in *Schott II* indicated the Court of International Trade should determine what evidence should be admitted, in the instant case, based upon the usual criteria of relevance, probative force, authenticity, accuracy, etc.

In the spirit of affording Schott a full opportunity to be heard and present its evidence, the Court presided over a lengthy trial which lasted eleven days. The parties have also presented extensive pretri-

[3] The United States Supreme Court has explained the rationale of the exception to the doctrine of *res judicata* as follows:

> There * * * should be an end of litigation * * * but circumstances justify limiting the finality of the conclusion in customs controversies to the identical importation. The business of importing is carried on by large houses between whom and the Government there are innumerable transactions, as here for instance in the enormous importations of wool, and there are constant differences as to proper classifications of similar importations. The evidence which may be presented in one case may be much varied in the next. The importance of a classification and its far-reaching effect may not have been fully understood or clearly known when the first litigation was carried through. One large importing house may secure a judgment in its favor from the Customs Court on a question of fact as to the merchandise of a particular importation, or a question of construction in the classifying statute. If that house can rely upon a conclusion in early litigation as one which is to remain final as to it, and not be reheard in any way, while a similar importation made by another importing house may be tried and heard and a different conclusion reached, a most embarrassing situation is presented. The importing house which has, by the principle of the thing adjudged, obtained a favorable decision permanently binding on the Government will be able to import the goods at a much better rate than that enjoyed by other importing houses, its competitors. Such a result would lead to inequality in the administration of the customs law, to discrimination and to great injustice and confusion. In the same way, if the first decision were against a large importing house, and its competitors instituted subsequent litigation on the same issues, with new evidence or without it, and succeeded in securing a different conclusion, the first litigant, bound by the judgment against it in favor of the Government, must permanently do business in importations of the same merchandise at great and inequitable disadvantage with its competitors.

United States v. *Stone & Downer Co.,* 274 U.S. at 235–36 (footnote omitted).

al and post-trial briefs as well as a statement of supplemental authorities to support their respective positions.

In *Schott I,* Chief Judge Re, after an examination of the legislative history of TSUS 540.67 and the applicable case law, determined color filtered glass which was (a) very high quality; (b) used for optical instruments; and (c) capable of performing an optical function, met the definition of optical glass for tariff purposes. *See* 82 Cust. Ct. at 16, 468 F. Supp. at 1321 (citing *Semon Bache & Co.* v. *United States,* 25 CCPA 239, T.D. 49339; *G.A.F. Corp.* v. *United States,* 67 Cust. Ct. 167, C.D. 4269 (1971); and *Ednal Co., Inc.* v. *United States,* 6 Cust. Ct. 552, Abs. 45423 (1941)). The court determined, on the basis of the presumption of correctness which attaches to a classification by Customs, the foregoing indicia were presumed to have been met with regard to the entries involved. Chief Judge Re noted that while Schott did not disagree with these indicia, Schott urged an additional factor must be present, *i.e.,* the glass must have a refractive index and dispersion with a known and controlled close tolerance (four to six decimal places for refractive index). The court held Schott failed to sustain its burden of proof with regard to this additional factor and overruled the protest.

In affirming the decision of the trial court, the court of appeals in *Schott I* adopted the indicia of optical glass as determined by the trial court. The court held the colored glass entries, which were of very high or the highest available quality in glass chosen for its absorption properties, were properly classified as optical glass for tariff purposes.

The question presented in the instant case, which is similar to that which was presented in *Schott I,* pertains to the proper classification of certain filter glass.

In *Schott II,* Judge Maletz described the subject merchandise, which description this Court adopts, as follows:

> Each of the seven types of filter glass is separately identified by invoice number, i.e., KG 4, WG 345, UG 1, UG 5, UG 11, RG 9, and RG 830. The KG 4 (slightly greenish in color) functions to absorb the near infrared light while allowing transmittance of visible light. It is used in cold light sources and in film projectors where it protects the transparency from being destroyed by heat. It is also used in sighting and aiming devices where it filters out infrared energy to maintain constant visibility of the ranges. All of these uses are in optical instruments.
>
> The WG 345 (colorless) functions to absorb specific wavelengths in the ultraviolet and to transmit visible light. It is used in solar filter simulators which are optical instruments.
>
> The UG 1, UG 5, and UG 11 all absorb visible light and part of the near infrared light and are distinguished only by darkness and lightness of color. They are used as substrates on interference filters and in spectrophotometers both of which are optical instruments.

> The RG 9 absorbs visible white and ultraviolet light and transmits infrared light. It is used in spectrometers and spectrophotometers which are optical instruments.
>
> The RG 830 is similar to the RG 9 and its use is the same; it differs in that it absorbs more visible light.
>
> With the exception of the KG 4, the various glass types are used in astronomical instrumentation at the Kitt Peak National Observatory which is the United States' national center for groundbased optical astronomy.

Schott II, 7 CIT at 37–38, 587 F. Supp. at 70.

For the reasons that follow, the Court concludes not only has plaintiff failed to demonstrate the determination in *Schott I* was clearly erroneous, but in the spirit of *Stone & Downer,* in a proceeding which for all intents and purposes was a trial *de novo,* plaintiff has failed to overcome the presumption of correctness afforded the classification by Customs.

Discussion

It is useful, at this point, to discuss the principles of law pertaining to the presumption of correctness and the burden of proof in Customs classification cases.

In 1980, Congress enacted 28 U.S.C. § 2639(a)(1) which codified the well-settled principles of decisional law that in actions commenced in the Court of International Trade challenging the classification of imports, the decision of the administering authority is presumed correct. The burden of proving otherwise rests with the party challenging the decision. *See Stewart-Warner Corp.* v. *United States,* 748 F.2d 663 (Fed. Cir. 1984); *Schott I,* 82 Cust. Ct. 11, C.D. 4783, 468 F. Supp. 1318 (1979). As a matter of law, as Chief Judge Re pointed out in *Schott I,* Customs is presumed to have found the existence of every fact necessary to support a classification determination. *See W.A. Gleeson* v. *United States,* 58 CCPA 17, C.A.D. 998, 432 F.2d 1403 (1970); *Novelty Import Co., Inc.* v. *United States,* 53 CCPA 28, C.A.D. 872 (1966); *F.H. Kaysing* v. *United States,* 49 CCPA 69, C.A.D. 798 (1962). The presumption of correctness attaches not only to the ultimate conclusion of the classification but also to every subsidiary fact necessary to support that conclusion. *Schott I,* 82 Cust. Ct. at 15, 468 F. Supp. at 1320.

The plaintiff has the burden of establishing the Government's classification is incorrect and that the claimed classification is correct. *Sanyo Elec. Inc.* v. *United States,* 84 Cust. Ct. 167, C.D. 4855, 496 F. Supp. 1311 (1980), *aff'd,* 68 CCPA 14, C.A.D. 1258, 642 F.2d 435 (1981). In deciding whether the presumption of correctness has been rebutted, the Court must consider whether the Government's classification is correct both independently and in comparison with the importer's alternative. *Jarvis Clark Co.* v. *United States,* 733 F.2d 873 (Fed. Cir. 1984), *reh'g denied,* 739 F.2d 628 (Fed. Cir. 1984); *Oak Laminates Div. of Oak Materials Group* v. *United States,* 8 CIT

175, 628 F. Supp. 1577 (1984), *reh'g denied,* 8 CIT 300, 601 F. Supp. 1031 (1984), *aff'd,* 783 F.2d 195 (Fed. Cir. 1986).

It is clear this Court must presume the decision of Customs was correct as to every fact necessary to support the conclusion the imported glass products in dispute were properly classified as optical glass. Plaintiff may rebut this presumption and demonstrate the correctness of an alternative classification. Furthermore, this Court has observed:

> It is an established principle of customs law that if the meaning of a word in a tariff provision is in dispute, the correct meaning is to be determined from its common meaning, that is, from its commonly received and popular sense * * *. What constitutes the common meaning of a tariff term is not a question of fact, but a question of law to be decided by the court. In ascertaining and understanding the common meaning of a tariff term, the court may consult dictionaries, scientific authorities and other reliable sources of information.

Schott I, 82 Cust. Ct. at 16, 468 F. Supp. at 1321.

Renewing an argument made in *Schott I,* plaintiff refers to the Tariff Act of 1922 and contends all indications of congressional intent in the enactment of the tariff provisions for optical glass show an intent not to include colored filter glass as optical glass. Plaintiff further argues nothing in the legislative history shows an intent by Congress to change the definition of "optical glass." While plaintiff cites testimony at hearings and *The Summaries of Trade and Tariff Information* to support its argument, the Court deems this authority insignificant. *See Daw Industries, Inc.* v. *United States,* 714 F.2d 1140 (Fed. Cir. 1983); *Dodge & Alcott, Inc.* v. *United States,* 45 CCPA 113, 116, C.A.D. 683 (1958). An examination of the several legislative reports cited by Schott reveals Congress had neither a concern to define the term "optical glass" nor an intent to exclude colored filter glass from being encompassed by that term.[4]

The relevant provisions of the Tariff Acts of 1922 and 1930 contain different terminology from that which is at issue in this case. Although the former Tariff Acts limited optical glass to the *uses* in which it was employed, item 540.67 eliminates that restriction by a change of terminology. In this regard, the Court adopts the principle that: "[a] change in the language of a statute has always been construed * * * to import a change in meaning unless the contrary is made plainly to appear in other ways." *United States* v. *American*

[4] Paragraph 227 of the Tariff Act of 1922 provided: "Optical glass or glass used in the manufacture of lenses or prisms for spectacles, or for optical instruments or equipment, or for optical parts, scientific or commercial, in any and all forms, 45 *per centum ad valorem.*" The Tariff Act of 1922, ch. 356, § 1, para 227, 42 Stat. 858, 873 (1922) (repealed 1930). The Senate Majority and Minority Reports do not discuss the meaning of "optical glass." *See* S. Doc. No. 595, 67th Cong., 2d Sess. (1922). Similarly, the House Report does not discuss the meaning of "optical glass." *See* H.R. Doc. No. 248, 67th Cong., 1st Sess. (1921). The Conference Report on the Specific Provision Concerning Optical Glass indicates only the House receded from disagreement on the tariff to be paid. *See* S. Doc. No. 253, 67th Cong., 2d Sess. (1922).

The Tariff Act of 1930 at Paragraph 227 provides: "Optical glass or glass used in the manufacture of lenses or prisms for spectacles, or for optical instruments or equipment, or for optical parts, scientific or commercial, in any and all forms, 50 *per centum per annum ad valorem.*" The Tariff Act of 1930, ch. 497, § 1, para 227, 46 Stat. 590, 607 (1930) (repealed 1962). At no place in the legislative history of the Act is there an attempt to arrive at a definition of the term "optical glass." *See* S. Doc. No. 138, 71st Cong., 2d Sess. (1930); H. R. Rep. No. 1326, 71st Cong., 2d Sess. (1930); S. Doc. No. 154, 71st Cong., 2d Sess. (1930); S. Doc. No. 158, 71st Cong., 2d Sess. (1930); S. Doc. No. 161, 71st Cong., 2d Sess. (1930); H. R. Rep. No. 1892, 71st Cong., 2d Sess. (1930); H.R. Rep. No. 1893, 71st Cong., 2d Sess. (1930).

Brown Boveri Electric Corporation, 17 CCPA 329, T.D. 43776 (1929). As defendant points out, *The Tariff Classification Study* provides: "Item 540.67 covers: (1) Prisms and optical elements *other than lenses,* of glass not optically worked, now dutiable under * * * as scientific articles of glass." *Schott I,* 67 CCPA at 34–35, 612 F.2d at 1285.

In *Schott I,* the court of appeals, in considering the common meaning of "optical glass," took note of this change. The court analyzed this change in light of the TSUS General Interpretive Rules provisions found in the General Headnotes and Rules of Interpretation section of TSUS which provides as follows:

> (c) an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it; but, in applying this rule of interpretation, the following considerations shall govern:
>
> (i) a superior heading cannot be enlarged by inferior headings indented under it but can be limited thereby;
>
> (ii) comparisons are to be made only between provisions of coordinate or equal status, i.e., between the primary or main superior headings of the schedules or between coordinate inferior headings which are subordinate to the same superior heading * * *.

TSUSA, General Headnotes and Rules of Interpretation, Headnote 10, Section C (1980).

The court of appeals stated that "it is clear that the meaning of 'other optical glass' in 540.67 cannot be broader than '[o]ptical glass in any form' in its superior heading. It is also clear that the phrase 'in any form' refers to the physical shape of the glass rather than to a material or quality of construction." *Schott I,* 67 CCPA at 34, 612 F.2d 1285.

The court of appeals in *Schott I,* after a lengthy analysis, concluded as follows:

> In view of the foregoing, we are persuaded that the common meaning of "optical glass" embraces the concept of "high quality" with respect to each of the various properties described above, absorption, refraction, polarization, etc. A criterion for determining "high quality" with respect to one property may apply exclusively to that property (*e.g.,* refractive index applies only to the refractive property) or may also apply in determining "high quality" with respect to other properties (*e.g.,* homogeneity applies to both the properties of absorption and refraction). When a glass is selected for a particular property, the proper inquiry is whether the glass is of high quality with respect to that property, and the quality with respect to other properties is immaterial.
>
> In the case of glass in which the refraction property is critical, at least two criteria must be met * * *. "[O]ne is a very careful knowledge of the chemical composition, that means both the deliberate addition of the necessary chemicals and the

> guaranty in the processing that this intended composition is actually obtained. The second is the refractive index to the degree specified in a good optical glass is strongly affected by the way it is cooled down or annealed. The lack of knowledge or lack of patience in the time allowed for it could lead to serious deviations in the [refractive] index and even in the fourth [decimal] place."
>
> In the case of glass in which the absorption property is critical, the degree of uniformity of color in the glass ("homogeneity") must be "very great," although * * * you do not require that this homogeneity is to the numbers stated in an optical glass. Nevertheless * * * [the glass should be] of very high or the highest quality available in glass chosen for its absorption property.

Schott I, 67 CCPA at 36–37, 612 F.2d at 1286–87 (citation omitted).

In urging the Court to reject the ruling in *Schott I,* Schott maintains that all earlier decisions have defined optical glass as refractory or colorless. Plaintiff cites numerous cases which it contends support this position. The Court finds, however, after an examination of these decisions and other cases, a contrary conclusion is warranted.[5] Upon close scrutiny, the Court concludes the decisions support the rationale of Chief Judge Re and the court of appeals in *Schott I* defining "optical glass."

Referring to other authorities such as dictionaries and scientific authorities, Schott urges that the classification of optical glass does not include color filter glass within the common meaning of the term.[6] Although some of the definitions cited by plaintiff seems in-

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[5] In *Semon Bache & Co.* v. *United States,* 25 CCPA 239, T.D. 49339 (1937), the court *held* that imported glass used in the manufacture of lenses for reflective buttons which were placed in signs or curves and crossings of roads as signals to reflect the light from automobile headlights, flash lights, and "cheap cameras" were not optical glass within the meaning of that term in paragraph 227 of the Tariff Act of 1930. This glass was not of high quality. The court held, in *Fdnal Co., Inc.* v. *United States,* 6 Cust. Ct. 552, Abs. 45423 (1941), that colored sheet glass used as filters for cameras was not optical glass since only glass provided for under paragraph 227 of the Tariff Act of 1930 was glass used for the manufacture of lenses or prisms for optical instruments or equipment. The court ruled that a filter for a camera was not a lens or prism for a camera (cameras were treated as optical instruments). The court also determined optical glass was an extra fine quality of flint or crown glass used for telescopes, microscopes, camera lenses, scientific instruments of precision and not for spectacle lenses, and pressed lenses for which inferior glass was used. The court made no mention of the significance of the glass being colored. In *Bausch & Lomb Optical Co.* v. *United States,* T.D. 24150, 6 Treas. Dec. 32 (1903), the Appraisers interpreted an 1897 tariff statute and determined that glass used in the manufacture of refracting bodies for optical instruments and intended to be ground into prisms or lenses for optical instruments was duty free. This determination seemed to have been limited in its scope by the "use" provisions as provided by the statute at that time. While not discussing the properties or the definition of optical glass, the General Appraisers in *Wiswall & Tichenor* v. *United States,* T.D. 28804, 15 Treas. Dec. 188 (1908), determined that cylinder glass plates *colored or uncolored* which because of their high cost were not adapted commercially for glaziers' or decorative purposes and which were manufactured with special care for the purpose of rendering them suitable for use in the manufacture of optical instruments, spectacles, and eyeglasses were entitled to duty-free entry under the Tariff Act of 1897 as optical glass. The Appraisers determined that the cylinder glass plates were not dutiable as cylinder, crown, or common window glass. The Appraisers indicated that glass manufactured for optical purposes required special attention be given to the purity of materials used in its manufacture to secure freedom from bubbles, seeds, cords, and striae of all kinds. There was no indication such optical glass was free of color. In *Hammell, Riglander & Co.* v. *United States,* T.D. 25252, 7 Treas. Dec. 693 (1904), the Appraisers held unpolished rough cut or unwrought *colored optical* glass known as coquille glass was entitled to enter duty free under paragraph 565 of the Tariff Act of 1897 covering "Glass plates or discs, rough cut or unwrought, for use in the manufacture of optical instruments, spectacles, and eye glasses, and suitable only for such use." The Appraisers, in *R.F. Dowling & Co.* v. *United States,* T.D. 14644 (1894), determined that *uncolored and colored* unpolished cylinder glass of a special quality; expressly designed for use in the manufacture of optical instruments, spectacles and eyeglasses; and in the form suitable only for such use was entitled to duty-free entry under the Tariff Act of 1890.

[6] One of the authorities cited by Schott includes the twelfth volume of the *Encyclopaedia Britannica.* This authority enumerates the qualities of optical glass as transparency and freedom from color, homogeneity, hardness and chemical stability, absence of internal strains, and refraction and dispersion. The description also provides that "[i]t is, in fact, admitted that some glasses, most useful optically, the dense barium crown glasses, which are so widely used in modern photographic lenses cannot be produced entirely free either from noticeable colour or from numerous small bubbles * * *. In practice * * * it is not found that the presence of a decidedly greenish-yellow colour * * * interferes at all seriously with the successful use of the lenses * * * so that it is preferable to sacrifice the perfection of the glass *in order to secure valuable optical properties.* XII *Encyclopaedia Britannica* 88 (11th Ed. 1910) (emphasis added). In the tenth volume of *Encyclopaedia Britannica,* optical glass is discussed as the highest quality of glass used for telescopes, microscopes, and camera lenses, and

Continued

consistent, others clearly indicate a characteristic of optical glass is freedom from color. With regard to optical glass used for lenses and prisms in microscopes, telescopes, and cameras, exact specifications of refraction and dispersion, high quality, and the absence of color are all important characteristics. On the other hand, with respect to *other types* of optical glass, where the property of absorption is significant, color and the degree of uniformity of that color in the optical glass (homogeneity), are important characteristics. The Court, therefore, holds the mere presence of color in glass does not by itself preclude the glass from being classified as optical glass under item 540.67 of the TSUS.

As pointed out by the Government in its brief, item 540.67 is an *eo nomine* designation of the term "optical glass." An *eo nomine* designation includes all forms of the article, depending upon any limitation of contrary legislative intent, judicial determination, administrative practice, or commercial designation. *Nootka Packing Co.* v. *United States,* 22 CCPA 464, T.D. 47464 (1935). It seems clear Congress has not treated optical glass in a restrictive sense. *See supra* n. 4.

At the trial in the instant action, Schott introduced the testimony of one of its employees, Dr. Marker, who was in charge of research, quality control, and technical services for the customers of Schott. Dr. Marker testified about the colored optical glasses sold by Schott which were intended for use in the infrared and ultra violet regions of the optical spectrum. Dr. Marker's testimony included the following exchange:

> Q. Are you certain of Schott's [sic] optical, what you consider optical glass, glasses intended for use in the infrared and ultra violet regions of the optical spectrum?
>
> A. Yes.
>
> * * * * * * *
>
> Q. How about infrared transmitting glass, is that something you are familiar with.

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not for spectacle lenses for which inferior glass is used. The passage indicates that "[o]ptical glass is always purchased on specification and must be supplied as having a definite refractice [sic] index * * * [and is used in] lens systems in instruments without colour fringes." X *Encyclopaedia Britannica* 417–18 (14th ed. 1929). In *Semon Bache & Co.* v. *United States,* 25 CCPA 239, 242, T.D. 49339 (1937), the court indicated the *Encyclopaedia Britannica* set forth optical glass as a term usually regarded as applying to the highest quality of glass for telescopes and microscopes and not to spectacle lenses for which inferior glass was used. There was no discussion as to color. The *Encyclopaedic Dictionary of Physics* provides with respect to optical glass that "[t]he raw materials used in its production are so selected as to ensure the optimum light transmission * * * consistent with composition necessary to produce the desired optical constants * * *. Most metallic oxides, at low concentrations, can colour glass, and hence the manufacturer finds it necessary to use only the purest of raw materials. The same principle is followed in making optical colour filters in order to control the colours required * * *." *Encyclopaedic Dictionary of Physics* 213 (1962). The *Funk & Wagnalls Standard College Dictionary* defines optical glass as: "High quality glass specialized in refractive and dispersive powers for lenses." *Funk & Wagnalls Standard College Dictionary* 948 (1968). It is silent as to the absence of color. In *Funk & Wagnalls Standard Dictionary of the English Language,* optical glass is referred to in a similar fashion; the text is silent as to color as a characteristic. I *Britannica World Language Edition of Funk & Wagnalls Standard Dictionary* 536 (1963). The *International Dictionary of Physics and Electronics* indicates optical glass is used in "lenses, prisms * * * as distinguished from mirrors, [and] must be * * * . [free of] bubbles, striae, [and] seeds * * *." It is silent as to color. The *International Dictionary of Physics and Electronics* 629–30 (1956). The *Military Standard Optical Terms and Definitions* defines "glass, crown," as: "A *type* of *optical glass* of the alkali-lime-silica type," with an index of refractor in the 1.5 to 1.6 range and an *Abbe constant* in the 64 to 57 range. "Glass, flint" is also defined as another *type* of optical glass to which lead and other elements are added to produce a higher index of refraction and a lower *Abbe constant.* "Glass, optical" is defined as glass which is carefully controlled with respect to composition melting, heat, and transmittance in order to obtain optical characteristics such as its index of refraction, dispersion, transmitance, spectral transmittance, and freedom from birefringence. The text is silent as to color. The *Military Standard Optical Terms and Definitions* 25 (Dep't of Defense 1967). The *New Encyclopaedia Britannica* indicates optical glass must be homogeneous of high purity and free from colour and underlines the importance of the indicies of refraction and dispersion. VIII *New Encyclopaedia Britannica* 211 (15th ed. 1982).

A. Somewhat, yes.

Q. Does Schott's [sic] produce that glass?

A. Yes.

Q. Is that an optical glass, as far as you know?

A. Yes, it would be considered an optical glass.

* * * * * * *

Judge CARMAN: Can you have infrared transmitting glass that is optical?

A. Yes. The chalcodinide glasses would be optical glass.

Judge CARMAN: And what color are they?

A. They are—they would appear to the eye to be black, but if I look at there [sic] transmission curve, once they turn-on, they would look like the transmission curve for any other optical glass—that is, it would show no internal structure; it would turn on, go all the way across the longwave length and then turn-off.

Judge CARMAN: What makes it happen that way?

A. That, again is a fundamental nature of the components that are in the glass.

Judge CARMAN: Even though it's colored black?

A. Even though it's colored black. It still has in its window, its optical glass. It has, now, the characteristics of optical glass; it's controlled for index and dispersion when it's manufactured. The only thing is, due to the electronic structure of the components in its formulation, they have a structure such that they're [sic] absorption is all through the visible, so to you it looks black.

August 14th Notes of Testimony at 1164, 1179, 1184–1185, *Schott Optical Glass, Inc.* v. *United States,* Court No. 81–01–00030.

Schott's witnesses, Pye, Sislen, and Modne also testified that some optical glasses are used in the ultraviolet and or infrared region of the optical spectrum. Dr. Kreidl, another witness of Schott, testified he knew of optical glass that was black. Apart from other evidence, Schott's own witnesses establish the proposition that in the commonly received and popular sense, absence of color is not a prerequisite for the classification of optical glass.

Schott's witness, Mr. Moore, conceded the American Ceramics Society is the principal professional organization specializing in the science of glass in the United States. The *Standard Definitions of Terms Relating to Glass and Glass Products* of the *American Society for Testing and Materials,* (ASTM), a text published in joint promulgation with the ASTM and The American Ceramics Society, defines optical glass as follows: "glass of high quality having closely specified optical properties used in the manufacture of optical systems." Brief for the United States, Defendant at 9, *Schott Optical Glass, Inc.* v. *United States,* Court No. 81–01–00030. This definition con-

tains no requirement for lack of color. The standard, moreover, is reviewed regularly. Schott's witness, Dr. Marker, also testified the color filter glasses in this case meet the ASTM standard.

The Government's exhibit (DX) 20, is an envelope which shows that the National Bureau of Standards (NBS) received numerous sets of color filter glasses from one of Schott's distributors. The sets were received prior to the decisions in *Schott I.* The envelope is clearly marked "optical glass filters."

Schott's exhibit (PX) 9(g) is a sample of one of the color filters in this case, UG 5. The sample is contained in an envelope marked "Schott Optical Glass."

DX 17 is an excerpt from a catalogue of one of the distributors of Schott's color filter glasses. The excerpt describes the glasses as "made from the highest quality Schott colored optical glass." While conceding the language was changed in later editions of the catalogue, the Government points out in its brief that the revision occurred subsequent to the decision in *Schott I.*

DX 4 is an undated color filter glass catalogue of Schott. The catalogue describes Schott's color filter glass as: homogeneous pieces of colored optical glass [which] are now available in relatively large sizes and thickness." The Government points out in its brief that this document was produced prior to 1975 since it was also an exhibit in *Schott I.*

DX 5 is also an undated edition of Schott's color filter glass catalogue which describes the glass as: "homogeneous pieces of colored optical glass * * * available in relatively large sizes and thickness."

PX 1(E) is an optical glass catalogue that indicates cerium is added to optical glass to increase its absorption properties for protection when exposed to gamma radiation. Dr. Kriedl, one of Schott's witnesses, testified the addition of cerium frequently shows some absorption at short wave lengths since the cerium addition causes a slightly yellowed appearance.

The record is replete with evidence that demonstrates color filter glass has been commonly and popularly known, advertised, described, purchased, and sold as optical glass. The stipulation of uncontested findings of fact entered into by the parties provides as follows:

> 17. The WG 345 glass transmits the visible (to the naked eye) and absorbs specific wavelenghts [sic] of radiation in the ultraviolet region of the electromagnetic spectrum. The WG 345 glass appears clear or colorless to the naked eye.
>
> 18. WG 345 is glass which as [sic] a transmittance of normally incident light of more than .66 percent at all wavelengths from 400 to 700 millimicrons, inclusive, and a transmittance of more than 80 percent at all wavelengths from 525 to 575 millimicrons, inclusive, for glass 1/4 inch thicknss [sic], or of the equivalent transmittances for any other thickness.

Uncontested Findings of Fact at 3, *Schott Optical Glass, Inc.* v. *United States,* Court No. 81-01-00030. WG 345 is also used in solar filter simulators which are optical instruments. *Schott II,* 7 CIT at 38, 587 F. Supp. at 70.

After close study of the entire record in this case, the Court finds all of the subject filter glass is of a very high quality, used for optical instruments, and capable of performing optical functions. The Court finds Schott has failed to overcome the presumption of correctness which attached to the Customs' classification of the imported glass as optical glass. Schott has thus failed to establish the imported glass products should not have been included as optical glass within the meaning of 540.67 TSUS.

The protest is therefore overruled. Judgment for the Government will be entered accordingly.

(Slip Op. 87-133)

WELLS MANUFACTURING CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, PERFILADOS TUPY, S.A., FUNDICAO TUPY, S.A., AND TUPY AMERICAN FOUNDRY CORP., DEFENDANT-INTERVENORS

Court No. 84-02-00193

Before CARMAN, *Judge.*

[Plaintiff's motion for review on the record is denied.]

(Decided December 8, 1987)

Michael H. Hall, Esq. (*Michael H. Hall* on the motion) for the plaintiff.

Lyn M. Schlitt, General Counsel, United States International Trade Commission; *Michael P. Mabile,* Assistant General Counsel (*Stephen A. McLaughlin* on the motion) for the defendant.

Freeman, Wasserman & Schneider, (*Bernard J. Babb* on the motion) for the defendant-intervenors.

MEMORANDUM OPINION

CARMAN, *Judge:* Plaintiff, Wells Manufacturing Company (Wells) commenced this action pursuant to section 516A(a)(1)(C) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(1)(C) (1982). Wells seeks judicial review of the preliminary negative determination by the International Trade Commission (ITC or Commission) in *Iron Bars From Brazil,* Inv. No. 701-TA-208, USITC Pub. No. 1472 (December, 1983).

Plaintiff contends the ITC incorrectly found neither a reasonable indication of material injury nor a reasonable indication of threat of material injury. In the plaintiff's view, the determination was based upon incomplete and inaccurate information provided to the ITC by its staff, upon inadequate consideration of the facts of the

case, and upon grounds prohibited by the legislative history of the countervailing duty law. Plaintiff requests this Court remand the determination to the ITC with directions that it make and publish a determination of reasonable indication of material injury and threat of material injury. In the alternative, Wells requests a remand for redetermination of whether there is a reasonable indication of material injury or threat of material injury with directions as to the ITC's treatment of the issues and facts raised in this motion and requiring that the parties be given an opportunity to present such additional information as may be relevant and material.

In opposition, the ITC defends its determination asserting that there is a rational basis in the record to support the determination. The ITC contends it properly applied the reasonable indication standard when it evaluated all the evidence in the record and found no reasonable indication of material injury or threat thereof. The defendant-intervenors take the position that there is no evidence in the record of a reasonable indication of material injury or threat of material injury. The intervenors request the Court sustain the determination since it is supported by a rational basis in fact and was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

On review of the determination and the facts supporting it, the Court finds the determination was neither arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The determination of the ITC is therefore sustained, and the plaintiff's motion is denied.

Facts

On November 15, 1983, Wells Manufacturing Company, a U.S. producer of continuous-cast iron bars,[1] filed a petition with the Department of Commerce (Commerce) and the ITC. Wells alleged that a domestic industry was materially injured or threatened with material injury by reason of imports of continuous-cast iron bars from Brazil upon which "bounties or grants" had been bestowed.

Pursuant to section 703(a) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1671b, the ITC instituted a preliminary countervailing duty investigation. As part of the investigation, the ITC distributed questionnaires to the domestic producers, distributors, and importers of the subject merchandise.

On December 9, 1983, the ITC held a public staff conference at which interested parties were permitted to present testimony and respond to questions from the ITC staff. Following the conference, the parties submitted post-conference briefs. A staff report discuss-

[1] Continuous-cast iron bars are provided for in items 606.97 and 657.09 of the Tariff Schedules of the United States (TSUS). In the preliminary determination, the ITC found that the like products in the investigation comprise iron bars manufactured by the continuous-cast process "which produces iron bars that are free of burned-on-slag and sand; have a uniform surface, density, and hardness; and are free from centerline shrinkage and internal porosity." *Iron Bars From Brazil, supra*, at 4 (footnotes omitted). The ITC also found that "[c]ontinuous-cast iron bars are used to manufacture a wide variety of components, primarily for the machine tool, agribusiness, and hydraulic-pneumatic industries." *Id.* (footnote omitted).

ing the relevant data accumulated during the investigation was then submitted to the ITC. The ITC subsequently found "[o]n the basis of the record developed in the subject investigation * * * that there is no reasonable indication that an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from Brazil of continuous-cast iron bars * * * ." *Iron Bars From Brazil, supra,* at 1 (footnote omitted).

The ITC based its determination principally on the overwhelming domination of the domestic industry by Wells and Shenango Company (Shenango), the absence of any clear pattern of underselling by the imports, indications that most sales lost to imports were due to reasons other than price, and the refusal of domestic producers to deal with a distributor which subsequently sought the imports. *Id.* at 3.

The ITC staff found that one Brazilian firm, Perfilados Tupy S.A. (TUPY) produces iron bars in Brazil. The ITC staff found that TUPY had continuous-cast machines for use in the production of iron bars but was unable to produce centerless-ground iron bars or bore iron tubes.

The staff also determined that TUPY was in the process of establishing American Iron & Alloys Corporation (AIA) as its sole U.S. distributor of iron bars. The ITC therefore determined that AIA was the primary importer of Brazilian continuous-cast iron bar.

AIA was incorporated in June, 1982 by Gary Griffin, the former head of the iron bar sales department of Wells Manufacturing Company. Although there is some dispute as to what transpired between AIA and Wells and Shenango, both Wells and Shenango refused to deal with AIA or set AIA up as a distributor. Part of the ITC's determination focuses upon this refusal to deal with AIA.

AIA has only one warehouse in Waukesha, Wisconsin and utilizes one distributor, J. Rubin & Company (Rubin). Because of the industry's practice of immediate shipment, and the 6 to 8 weeks needed for delivery from Brazil, AIA must maintain a large inventory. The ITC found that the absence of a nationwide network of distributors and warehouses hampered AIA's ability to compete outside of the Midwest region. In contrast, the ITC found, both Wells and Shenango have maintained a nationwide network of distributors to sell their products.

The ITC also found that iron bar distributors must cut the bar to length and into special shapes, as the customer requires. Thus, to supply orders in a timely manner, the distributors must stock various types of bars. Consequently, inventories in the industry are necessarily high.

Concerning the question of material injury, the ITC conclusively determined that the volume and timing of the imports do not provide a reasonable indication of a nexus between the imports and the

condition of the domestic industry. During the period of investigation, the ITC found that the level of imports of iron bars as a share of U.S. consumption was not significant, the domestic industry supplied virtually the entire U.S. market, and further that imports entered the U.S. after the domestic industry had experienced most of its major sales decline.

With regard to threat of material injury, the ITC found that "[t]he imports' low U.S. market penetration combined with limited foreign production capacity fails [sic] to establish any reasonable indication of a threat of material injury." *Iron Bars From Brazil, supra*, at 7 (footnotes omitted). The ITC also considered the nature of inventory practices in the industry an important factor in evaluation the inventory data in the investigation.

Background

Before considering the merits of the arguments presented in this action, the Court finds it necessary to discuss the relevant statutory provisions. Section 702 of the Tariff Act of 1930, as added by the Trade Agreements Act of 1979, 19 U.S.C. § 1671b(a) (1980 & Supp. 1985) provides the basic framework for a preliminary determination by the ITC of a reasonable indication of material injury or threat of material injury in a countervailing duty investigation. Utilizing the best information available to it at the time of the determination, the ITC must ascertain whether there is a reasonable indication that:

> (1) an industry in the United States—
>
> (A) is materially injured, or
> (B) is threatened with material injury, or
>
> (2) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of the merchandise which is the subject of the investigation by the administering authority. If that determination is negative, the investigation shall be terminated.

Id. Material injury is defined as "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A) (1980 & Supp. 1985).

In arriving at a determination under 19 U.S.C. § 1671b(a), the ITC is directed to consider the following factors, among others:

> (i) the volume of imports of the merchandise which is the subject of the investigation,
> (ii) the effect of imports of that merchandise on prices in the United States for like products, and
> (iii) the impact of imports of such merchandise on domestic producers of like products.

19 U.S.C. § 1677(7)(B) (1980 & Supp. 1985). Essential to this analysis are the following guidelines:

> (C) Evaluation of volume and of price effects.—For purposes of subparagraph (B)—
>
> (i) Volume.—In evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.
>
> (ii) Price.—In evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether—
>
> (I) there has been significant price undercutting by the imported merchandise as compared with the price of like products of the United States, and
>
> (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.
>
> (iii) Impact on affected industry.—In examining the impact on the affected industry, the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry, including, but not limited to—
>
> (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
>
> (II) factors affecting domestic prices, and
>
> (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment.

19 U.S.C. § 1677(7)(C) (1980 & Supp. 1985).

If the ITC makes a negative determination as to whether there is a reasonable indication of material injury or threat of material injury, then review is available in this Court within 30 days after the date the determination is published in the Federal Register. *See* 19 U.S.C. § 1516a(a)(1)(C) (1980 & Supp. 1985). The Court is bound to hold unlawful such a determination found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law * * *." 19 U.S.C. § 1516a(b)(1)(A) (1980 & Supp. 1985). With these provisions in mind, the Court turns to a discussion of the arguments made by the plaintiff in support of its motion for review on the record.

DISCUSSION

Plaintiff contends that the report prepared by the ITC staff for the ITC (staff report) and the ITC's determination were strongly influenced by allegations of trade restrictive practices on the part of the domestic industry. According to the plaintiff, four claims made by the intervenors (respondents in the administrative proceedings) were accepted at face value by the staff and the ITC. Plaintiff asserts the ITC staff ignored information received during the investigation which negated the claims of trade restrictive practices and did not make this information available to the ITC. In short, plaintiff argues, the allegations were accepted "without questioning whether the allegations were supported or negated by other information obtained in the investigation, and without analysis as to justification for any actions actually taken." Plaintiff's Brief in Support of Plaintiff's Motion for Review on the Record at 8, *Wells Manufacturing Company* v. *United States,* Court No. 84–02–00193.

The first allegation that plaintiff contends was accepted at face value was that Wells refused to sell domestically-produced continuous cast iron bars to AIA. In this regard, Wells asserts the staff and the ITC incorrectly relied upon a statement made by Gary Griffin, the president of AIA. Plaintiff argues this statement contradicts another statement previously made by Mr. Griffin.

The second allegation made by the intervenors which plaintiff challenges concerns Shenango's refusal to sell to AIA. According to Wells, this refusal "establishes nothing more than Shenango's decision to not add Mr. Griffin as a distributor; Shenango already had an established line of distributorships, including a distributor in the region where Mr. Griffin established his business * * *." Plaintiff's Brief in Support of Plaintiff's Motion for Review on the Record, *supra,* at 11. Plaintiff also asserts that it is reasonable to believe that the refusal to sell to AIA was made on valid business grounds.

The third allegation allegedly accepted at face value was that the termination of the distributorship of Casting Consultants, Inc. (CCI) by Shenango was evidence of an improper refusal to sell to AIA. In this regard, plaintiff argues that the staff and the ITC were influenced by CCI's initiation of legal action in the Wisconsin courts. In the plaintiff's view, the question of whether or not Shenango complied with Wisconsin statutes in terminating the distributorship was irrelevant in the investigation.

The final allegation regarding trade restrictive practices concerns the treatment of Rubin, a distributor of Brazilian iron bars. Plaintiff maintains the record does not support the allegation that Midwest Alloys, Wells' wholly owned distributor in the Chicago area, directly solicited business from Rubin's customers. Rubin alleged these customers comprised 90% of Rubin's business. In fact, plaintiff asserts, Rubin was attempting to take away one of Midwest Alloys' established customers.

The second argument made by plaintiff concerns the ITC's treatment of the four allegations. In this regard, plaintiff alleges that the ITC neglected to make a finding that the injury to plaintiff was caused by the trade restrictive practices. As such, plaintiff asserts, the ITC is prohibited from weighing any injury caused by those alleged practices against the injury caused by the imports. Plaintiff contends Congress has required that the ITC state its conclusions of fact and of law in making its determinations, and further that "factors such as trade restrictive practices be considered *only* when it is established that they, and not the imported merchandise, are the cause of the injury suffered by the domestic industry." Plaintiff's Brief in Support of Plaintiff's Motion for Review of the Record, *supra*, at 24–25. In other words, plaintiff argues, trade restrictive practices may be considered only when they are the *sole* cause of the injury. In the plaintiff's view, because the ITC weighed the injury caused by trade restrictive practices against the injury caused by the imports, the determination was not in accordance with law. If allowed to stand, plaintiff argues, importers will be given immunity from application of the countervailing laws when domestic manufacturers refuse to sell to them.

As its third argument, plaintiff challenges the staff report's treatment of information regarding the question of material injury and threat of material injury to the domestic industry. Plaintiff maintains that the staff report fails to present a complete, fair, and accurate statement of information obtained in the investigation concerning the importers, domestic industry, profitability of the domestic industry, volume of imports from Brazil, prices of continuous-cast iron bars, data on lost sales, and data on lost revenue.

With regard to the importers, plaintiff contends the staff report ignored Tupy American Foundry Corporation (TAFCO), the United States sales representative for the Brazilian manufacturer. Plaintiff also alleges that Quaker City Castings, Inc. (Quaker) was erroneously included within the domestic industry in the staff report. In the plaintiff's view, Quaker is an importer of continuous-cast iron bars and should be excluded from the domestic industry under 19 U.S.C. § 1677(4)(B).

With regard to the profitability of the domestic industry, plaintiff asserts that the staff report fails to present an analysis of profitability and sales volume of the domestic industry. In the plaintiff's view, reduced profitability of the industry was due in large part to inadequate return on sales not to reduced sales levels. This inadequate return, plaintiff asserts, was caused by increased expenses and the availability of inexpensive Brazilian imports.

Plaintiff alleges that the staff, at the direction of the Commissioner took the unprecedented and unjustified action of adjusting imports for inventories. According to the plaintiff, an adjustment of imports for inventories constitutes abnormal methodology and violates 19 U.S.C. § 1677(7)(C) which requires consideration of "the vol-

ume of imports of the merchandise," not a figure adjusted so as to reduce the apparent effect of imports.

In the staff report, the prices of AIA are compared with those of both manufacturers and distributors of the domestically produced merchandise. Plaintiff maintains that the only prices which can meaningfully be compared with the prices of domestic producers are those prices reported by TAFCO. According to the plaintiff, AIA's prices should be compared only with the prices of other distributors. In other words, comparisons should be based on the relative positions in the distribution channel.

Plaintiff contends the staff report presented only what was described as "weighted-average" prices for the U.S. data, without explaining how the prices were weighted. Plaintiff also argues that the prices of domestic product are distorted since these prices included volume discounts. As such, plaintiff asserts, the domestic prices are weighed in favor of the lowest (high-volume) prices, regardless of the sales volume of the Brazilian product with which the prices are compared. In essence, plaintiff argues, this distortion conceals the true pattern of underselling by the Brazilian product and affects the determination regarding the effects of this merchandise on the market for continuous-cast iron bar.

Plaintiff argues that the ITC staff interpreted the information on lost sales in the light most favorable to the Brazilian imports. Plaintiff also contends that additional information concerning lost sales which was made available to the ITC was ignored. More specifically, plaintiff contends that of the 12 firms contacted, nine reported purchasing Brazilian iron bars. According to the plaintiff, all of these purchases were made on the basis of price.

With regard to the information concerning lost revenues, plaintiff contends that the staff report does not accurately reflect the information obtained in the investigation concerning lost revenues and price suppression due to the Brazilian iron bars.

For its fourth argument, plaintiff contends that facts concerning the inability of the domestic producers and distributors to raise prices were not made available to the ITC in the staff report. According to the plaintiff, the domestic industry was unable to raise prices because of price undercutting of the Brazilian imports. As a result, plaintiff asserts, profitability of the domestic industry declined. In the plaintiff's view, the domestic industry's failure to raise prices was not evidence of strength as the ITC found but was rather evidence of an inability to raise prices due to the underpriced Brazilian imports. Plaintiff also argues that this lack of profitability to the domestic industry establishes the requisite nexus between the imports and the condition of the industry. Finally, plaintiff argues, although the ITC stated that the level of imports of iron bars from Brazil as a share of U.S. consumption was not significant, the manner in which the volume data was treated obscured the true relationship between imports and consumption.

In the plaintiff's view, "it was not the intent of Congress to '[make] relief more difficult to obtain for those industries facing difficulties from a variety of sources, *precisely those industries that are most vulnerable to subsidized or dumped imports.'* " Plaintiff's Brief in Support of Plaintiff's Motion for Review on the Record, *supra,* at 61 (citing H.R. Rep. 317, 96th Cong., 1st Sess. 47 (1979). Thus, plaintiff argues, the ITC should have found the domestic industry suffered material injury as a result of its inability to obtain reasonable profitability levels.

As previously discussed, a preliminary determination by the ITC must be sustained unless the Court finds the determination to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(A). This standard requires the following:

> A reviewing court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment * * *. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow onw * * *." The agency must articulate a "rational connection between the facts found and the choice made."

Bowman Transportation v. *Arkansas Best-Freight System,* 419 U.S. 281, 285 (1974) (citation omitted). The Court must therefore determine whether or not there was a rational basis for finding that there was no reasonable indication that the domestic industry producing continuous-cast iron bars was materially injured or threatened with material injury by reason of imports of continuous-cast iron bars from Brazil.

At the time the briefs in this case were filed, there was considerable controversy concerning the appropriate application of the reasonable indication standard. The controversy revolved around several decisions of this Court holding that the ITC may not weigh conflicting evidence in arriving at a preliminary determination. In the first of these cases, *Republic Steel* v. *United States,* 8 CIT 29, 591 F. Supp. 640 (1984), *reh'g denied,* 9 CIT 100 (1985), this Court remanded to the ITC two determinations in countervailing duty investigations because the ITC had weighed conflicting evidence in reaching a negative preliminary determination. This Court ruled that "[t]he object of these determinations should have been simply to find whether there were any facts which raised the possibility of injury. The resolution or interpretation of conflicting facts should have been reserved for a possible final injury determination." 8 CIT at 40, 591 F. Supp. at 650 (emphasis omitted). *See also Jeanette Sheet Glass Corp.* v. *United States,* 9 CIT 154, 160, 607 F. Supp. 123, 129 (1985), *appeal dismissed,* 803 F.2d 1576 (Fed. Cir. 1986), *vacated in part,* 11 CIT ——, 654 F. Supp. 179 (1987) ("[T]he 'reasonable indication' standard applicable to the Commission's preliminary investi-

gations * * * was intended by Congress to be administered as a very low evidentiary threshold for an affirmative preliminary determination * * *."); *American Grape Growers* v. *United States,* 9 CIT 396, 615 F. Supp. 603 (1985); *Armstrong Rubber Co.* v. *United States,* 9 CIT 403, 614 F. Supp. 1252 (1985).

The controversy was resolved, however, by the decision of the United States Court of Appeals for the Federal Circuit in *American Lamb Company* v. *United States,* 9 CIT 260, 611 F. Supp. 979 (1985), *rev'd,* 785 F.2d 994 (Fed. Cir. 1986). *American Lamb* involved an appeal of a decision of this Court which remanded to the ITC a preliminary negative determination in an antidumping duty investigation. In the investigation, the ITC weighed all the evidence bearing on the issue of injury and determined there was no reasonable indication that the domestic lamb industry was being materially injured, being threatened with material injury, or that an industry in the United States was being materially retarded. This Court ruled that "in a preliminary investigation, the Commission's responsibility is simply to find whether any facts reasonably raise the *possibility* of injury." 9 CIT at 262, 611 F. Supp. at 980 (emphasis supplied).

The Court of Appeals ruled that the "mere possibility" standard articulated by the lower court was unacceptable in view of the requirement that "[a] reviewing court must accord substantial weight to an agency's interpretation of a statute it administers." 785 F.2d at 1001 (citations omitted). The Court of Appeals found that the statutory phrase "reasonable indication" did not mean the same thing as mere possibility and that the ITC's weighing of evidence was consistent with the intent of Congress. As the Court of Appeals succinctly stated:

> A series of factors—Congress' requirement that ITC conduct a thorough investigation, using the best information available to it, Congress' expectation of opportunity for interested parties to present their views, and Congress' provision of the "reasonable indication" standard for use in investigations initiated in response to a petition and in ITC's self-initiated investigations—all militate against a view that Congress intended ITC to disregard evidence that clearly and convincingly refutes the allegations in a petition.

785 F.2d at 1003. The Court of Appeals noted that the governing standard for review of an ITC preliminary negative determination is an inappropriate basis for reversing the determination. The Court explained: "[w]hether the court might find it more difficult to overturn a negative preliminary determination when ITC had weighed conflicting evidence cannot be a factor in evaluating the permissibility of ITC's method of determining the presence or absence of a 'reasonable indication' of injury or threat of injury." 785 F.2d at 1004.

Turning now to the facts of this case, the Court finds there was a rational basis in the record for the ITC's determination that there is

no reasonable indication of material injury from the imports from Brazil. As stated above, the ITC is permitted to weigh the evidence bearing on the question of injury. In addition, the ITC may, and indeed must, consider all evidence presented which comprises the record, whether or not incorporated in the staff report. Thus, while plaintiff disagrees with the manner in which the data was presented in the staff report, the staff report is only one of the documents comprising the record considered by the ITC. Furthermore, the staff is not required to present the data in the light most favorable to the plaintiff. The staff is concerned solely with presenting a complete and accurate picture of the state of the domestic industry for a particular product or products.

In considering the evidence regarding material injury, the ITC in a preliminary determination is directed to make a thorough investigation based upon the best information available to it at the time of the determination. 785 F.2d 1003 (citing with approval *Budd Co. Railway Division* v. *United States*, 1 CIT 67, 71, 507 F. Supp. 997, 1000 (1980)). The ITC may consider, among other factors, trade restrictive practices. H.R. Rep. No. 317, 96th Cong. 1st Sess. 47 (1979); 19 C.F.R. § 207.27. Therefore, it was clearly reasonable for the ITC to have considered such practices in making its determination. As the determination clearly provides, moreover, evidence of trade restrictive practices was only one of the factors considered by the ITC. *Iron Bars From Brazil, supra,* at 1. The determination provides that "[t]he *record* fails to establish the requisite causal link between the imports under investigation and the performance of the domestic industry." *Id.* at 5 (emphasis supplied). Furthermore, although there appears to be an inconsistency in the evidence regarding trade restrictive practices by Wells, the fact remains that Wells and Midwest Alloys refused to sell to AIA. List No. 1 of the Administrative Record, Doc. 26 at A-9, *Wells Manufacturing Company* v. *United States,* Court No. 84-02-00193. This refusal induced AIA to purchase the imported bars. The same conclusion is warranted with regard to Shenango whether or not Shenango had valid business grounds for its refusal to deal with AIA. With respect to Shenango's revocation of the distributorship with CCI, the Court finds this factor was not material in the ITC's determination. The determination was based on the refusals by both Wells and Shenango to deal with AIA. *Iron Bars From Brazil, supra,* at 7. The revocation was mentioned only briefly in a footnote. Finally, it is not clear why the determination would have been different had these practices not been considered or had otherwise been considered in a different manner.[2]

In the discussion regarding the causal link between the imports and the condition of the domestic industry, the ITC pointed out that the volume and timing of imports failed to provide a "reasonable indication of a nexus" between these factors. *Iron Bars From Brazil,*

[2] It is interesting to note that Chairman Eckes "d[id] not join in the discussion regarding refusal to sell because it ha[d] no bearing on his determination in this phase of the investigation." *Iron Bars From Brazil, supra,* at 6 n.25.

supra, at 5. The ITC found that throughout the period under investigation, the domestic industry supplied virtually the entire U.S. market, and the level of imports of iron bars as a share of U.S. consumption was not significant. The ITC also found that while net sales and profitability of the industry declined consistently from 1980 to 1982, remaining depressed in the interim period of 1983, the imports from Brazil entered in late 1982, "after the domestic industry had experienced most of its major sales decline." *Id.* at 6. Furthermore, there was evidence in the record that the presence of Brazilian imports did not have a price suppressing effect. For example, plaintiff admitted at the ITC conference that it has consistently followed a practice of price restraint even during periods of high inflation. Doc. 13 at 11. Thus although plaintiff urges the ITC should have found that lack of profitability was due to the Brazilian imports, there was a rational basis in fact for the ITC to find otherwise.

With regard to the pricing comparisons made by the ITC, plaintiff contends the staff report erroneously contains a comparison of AIA's prices with those of domestic producers. According to the plaintiff, price comparisons must be based on the relative level in the distribution channel. Although this assertion seems correct, the ITC's approach in this regard was reasonable. The staff report contains a comparison of AIA's prices with prices of both U.S. producers and distributors. *See* List No. 2 of the Administrative Record, Conf. Doc. 5 at A–27– A–23, *Wells Manufacturing Company* v. *United States,* Court No. 84–02–00193. Thus, the ITC was presented with the information plaintiff contends the ITC should have considered.

Plaintiff asserts that volume discounts skewed the data in favor of the importers. The chief sales manager of Wells testified, however, that "[t]here is basically no significant difference between what we would charge a distributor or a direct account and what we charge a large volume account * * *. We don't have a lot of discounting policies or situation-type pricing policies." Doc. 13 at 62. Plaintiff's own testimony therefore contradicts its argument that volume discounts granted by the domestic industry skewed the pricing data in favor of the importers.

Plaintiff argues that the inclusion of Quaker within the domestic industry distorts the true picture of the condition of the domestic industry. Additionally plaintiff contends Quaker should not have been summarily dismissed from consideration as an importer. However, since the ITC found that Quaker had an insignificant share of the U.S. market, and TAFCO no longer ships directly to Quaker, the Court finds the ITC's treatment of Quaker was not clearly erroneous.

Concerning the question of whether or not TAFCO should have been considered an importer, the Court finds reasonable the ITC's determination that inclusion of TAFCO would have amounted to the double-counting of imports. As the ITC found that virtually all

of TAFCO's shipments were destined for AIA, and the ITC calculated the amount of imports of AIA, there was a rational basis in fact for the ITC's treatment of TAFCO.

The ITC noted that instances of lost sales were not due to lower prices. The confirmed instances of lost sales and revenues resulting from lower priced imports involved only an insignificant volume of iron bars. Doc. 25 at 6. Furthermore, the ITC found that the largest lost sale was lost by Wells not because of lower priced imports, but because Wells was trying to bypass the purchaser and sell directly to one of the purchaser's customers. *See* Conf. Doc. 5 at A–35. The ITC also concluded that the difficulties experienced by the domestic industry were unrelated to imports from Brazil since they preceded the date these imports entered the U.S. market. *Iron Bars From Brazil, supra,* at 5–6. On the basis of these findings, the Court holds that there was a rational basis in the record for the determination that lost sales data failed to provide evidence of a causal relationship between Brazilian imports and the condition of the industry.

Regarding the issue of threat of material injury, Congress has directed that "[a]n ITC affirmative determination * * * must be based upon information showing that the threat is real and injury is imminent, not a mere supposition or conjecture." S. Rep. No. 249, 96th Cong., 1st Sess. 88–89 (1979). *See also* H.R. Rep. No. 317, *supra,* at 47. To determine whether or not the threat is "real and the injury is imminent," the ITC must examine the following criteria:

> [D]emonstrable trends—for example, the rate of increase of the subsidized or dumped exports to the U.S. market, capacity in the exporting country to generate exports, the likelihood that such exports will be directed to the U.S. market taking into account the availability of other export markets, and the nature of the subsidy in question * * *.

Id.

Accordingly, with respect to the ITC's determination of no reasonable indication of threat of material injury, plaintiff argues the staff report contains an inaccurate representation of Brazilian iron bar capacity. More specifically, plaintiff argues that the staff should not have calculated Brazilian iron bar capacity on the assumption that the producer operated a single rather than a double shift. According to Wells, the Brazilian manufacturer has capacity far in excess of apparent Brazilian requirements and few, if any, export markets other than the United States.

The ITC found, however, and the record shows that AIA does not have the capability to expand its market share of the United States to any significant degree. As the ITC found, AIA, now the sole distributor of Brazilian imports, has only one warehouse and one distributor. Both are located in the Midwest. Doc. 13 at 76–77; Conf. Doc. 5 at A–13. In comparison, Wells has 7 distributors and 16 warehousing locations. These locations are scattered throughout the country. Doc. 13 at 30. Because the costs of transporting individual

shipments by AIA are higher than the costs of bulk shipments by Wells to local distributors, nationwide competition by AIA is extremely difficult. Furthermore, the Brazilian producer lacks the ability to make centerless-ground iron bars or bore iron tubes, two of the most profitable activities. Doc. 13 at 72.

The ITC also determined that AIA's sales represent an insignificant share of the domestic market. Thus, even if capacity figures were adjusted to account for double shifts, the Brazilian producer's limited ability to expand its share of the U.S. market precludes a finding of a reasonable indication of a threat of material injury.

Plaintiff also contends that the staff and the ITC failed to consider the alleged history of the Brazilian producer's unfair trade practices. As the defendant has argued, however, the question of whether or not subsidies have been conferred in other investigations is not probative in an injury determination.

Plaintiff argues, however, that Mr. Griffin, the president of AIA, and a prior employee of Wells, had obtained a wide knowledge of the domestic iron bar industry. According to plaintiff, this knowledge which was a competitive advantage facilitating rapid penetration of the U.S. market was not mentioned in either the staff report or the ITC's determination.

Also with regard to penetration levels, plaintiff contends that the ITC should not have adjusted import penetration figures for inventories. Plaintiff argues that the ITC should consider the rate of increase in the market penetration level as evidence of a threat of material injury.

On review of the record, however, and despite the alleged competitive advantage held by Mr. Griffin, the Court finds sufficient the ITC's determination that the insignificant volume of imports and their small market penetration precluded a finding of threat of material injury. As the defendant has argued, even the *increase* in the penetration level is far from threatening.

The ITC also determined that since the industry customarily maintains large inventories, an adjustment for inventories was appropriate. Because AIA entered the market in 1982, and initial shipments were used to establish this inventory, the ITC reasonably concluded that inclusion of the inventory held by AIA would have misrepresented AIA's actual sales data and distorted AIA's actual impact on the market.

Conclusion

In view of the above, the Court holds that the ITC's determination, of no reasonable indication of material injury or threat of material injury, was neither "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." § 1516a(b)(1)(A).

Accordingly, plaintiff's motion is denied, and the determination is sustained.

(Slip Op. 87-134)

W.R. FILBIN & CO., INC., PLAINTIFF v. UNITED STATES, DEFENDANT

Court No. 86-03-00386

[Motion to set aside dismissal granted.]

MEMORANDUM OPINION AND ORDER

(Decided December 9, 1987)

Schnader, Harrison, Segal & Lewis (Saul L. Sherman and Lance E. Tunick, on the motions) for plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *(John J. Mahon)* on the motions for the defendant.

Watson, Judge: This action was dismissed on October 8, 1987 for lack of prosecution pursuant to Rule 83(c) of the Rules of the United States Court of International Trade. On October 15, 1987, government counsel attempted to file a proposed submission on agreed statement of facts and proposed decision and judgment agreed to by the parties. The Clerk's Office refused to file the papers and issued a Notice of Rejection under Rule 81(a), citing the October 8th Order of Dismissal. Plaintiff now asks the Court to treat the submission of the proposed Stipulation of Facts and Judgment as necessarily implying a request to reopen the case which, occurring as it did within thirty days after dismissal, would be the equivalent of a timely motion. The government argues thai it mistakenly sought to file the proposed Decision and Judgment, that it would not have done so had it known of the dismissal, and that it had no intention to make a motion to vacate the dismissal.

Nevertheless, there are times when the interests of justice require a Court to attribute consequences to a party's action which may not have been within the exact contemplation of the party. From the Court's point of view, it does not matter who brought this proposed stipulation and judgment to the Court. What is important is that it represented the agreement of the parties as to a just result in the case. Such a presentation to the Court should be viewed as implying a desire on the part of the parties that the Court take whatever procedural measures are necessary to accomplish the just result. If by some chance, one party has overlooked a procedural objection which it might have raised, the Court should not exercise its authority to encourage the making of that objection. The primary objective of the Court should be to encourage true justice. And the rules should always be applied with this in mind. It follows that in this case the Clerk's Office, when presented with a proposed Stipulation and Judgment coming within the time within which the case might have been revived, should have allowed the papers to be filed.

This reasoning, of course, is limited to filings in which the agreement of the parties as to the desired result is manifest.

Accordingly upon reading and filing plaintiff's motion to restore and to enter the stipulated judgment for good cause shown, and defendant's opposition thereto, and upon all the papers and proceedings had herein, upon due deliberation, it is hereby

ORDERED, that plaintiff's motion is granted, to the extent that the order entered herein on October 8, 1987 dismissing the action for failure to prosecute is hereby vacated. The stipulation for judgment on agreed statement of facts shall be resubmitted and accepted for filing, with or without a proposed stipulated judgment.

(Slip Op. 87-135)

JOHN V. CARR & SON, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 86-03-00387

[Motion to set aside dismissal granted.]

MEMORANDUM OPINION AND ORDER

(Decided December 9, 1987)

Schnader, Harrison, Segal & Lewis (Saul L. Sherman and Lance E. Tunick, on the motions) for plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (*John J. Mahon*) on the motions for the defendant.

WATSON, *Judge:* This action was dismissed on October 8, 1987 for lack of prosecution pursuant to Rule 83(c) of the Rules of the United States Court of International Trade. On October 15, 1987, government counsel attempted to file a proposed submission on agreed statement of facts and a proposed decision and judgment agreed to by the parties. The Clerk's Office refused to file the papers and issued a Notice of Rejection under Rule 81(a), citing the October 8th Order of Dismissal. Plaintiff now asks the Court to treat the submission of the proposed Stipulation of Facts and Judgment as necessarily implying a request to reopen the case which, occurring as it did within thirty days after dismissal, would be the equivalent of a timely motion. The government argues that it mistakenly sought to file the proposed Decision and Judgment, that it would not have done so had it known of the dismissal, and that it had no intention to make a motion to vacate the dismissal.

Nevertheless, there are times when the interests of justice require a Court to attribute consequences to a party's action which may not have been within the exact contemplation of the party.

From the Court's point of view, it does not matter who brought this proposed stipulation and judgment to the Court. What is important is that it represented the agreement of the parties as to a just result in the case. Such a presentation to the Court should be viewed as implying a desire on the part of the parties that the Court take whatever procedural measures are necessary to accomplish the just result. If by some chance, one party has overlooked as procedural objection which it might have raised, the Court should not exercise its authority to encourage the making of that objection. The primary objective of the Court should be to encourage true justice. And the rules should always be applied with this in mind. It follows that in this case the Clerk's Office, when presented with a proposed Stipulation and Judgment coming within the time within which the case might have been revived, should have allowed the papers to be filed. This reasoning, of course, is limited to filings in which the agreement of the parties as to the desired result is manifest.

Accordingly upon reading and filing plaintiff's motion to restore and to enter the stipulated judgment for good cause shown, and defendant's opposition thereto, and upon all the papers and proceedings had herein, upon due deliberation, it is hereby

ORDERED, that plaintiff's motion is granted, to the extent that the order entered herein on October 8, 1987 dismissing the action for failure to prosecute is hereby vacated. The stipulation for judgment on agreed statement of facts shall be resubmitted and accepted for filing, with or without a proposed stipulated judgment.

(Slip Op. 87–136)

MITSUBISHI INTERNATIONAL CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

VOLUME FOOTWEAR RETAILERS OF AMERICA AND FOOTWEAR DIVISION OF THE RUBBER MANUFACTURERS ASSOCIATION, INC., AMICI CURIAE

Court No. 82–4–00491

Before RAO, *Judge.*

Women's "jogger" shoes, admittedly of leather, rubber and plastic components, are in chief value of leather since the leather component is of greater value than the rubber or plastic component, even though the combined value of the rubber and plastic components are of greater value than the leather.

Sharretts, Paley, Carter, & Blauvelt (Peter J. Baskin on the brief) for plaintiffs.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office (*Jerry Wiskin* on the brief) for defendant.

Mandel & Grunfeld (*Steven P. Florsheim* and *Robert B. Silverman* on the brief) for Volume Footwear Retailers of America, Amicus Curiae.

Lamb & Lerch (*Richard J. Kaplan* on the brief) for Footwear Division of the Rubber Manufacturers Association, Inc., Amicus Curiae.

RAO, *Judge:* This civil action is before the Court on submission pursuant to a Stipulation Upon Agreed Statement of Facts In Lieu Of Trial. It involves the proper classification of certain women's footwear, commonly known as "joggers," which are composed of leather, plastic and rubber.

The merchandise is concededly in chief value of leather, if the value of the leather, plastics and rubber are considered separately. However, if the values of the rubber and plastics are combined, the value of these components would exceed the value of the leather component.

The "joggers" were classified by the United States Customs Service (Customs) under then item 700.85 (now item 700.95) of the Tariff Schedules of the United States (TSUS) as "Other footwear * * * Other * * * Other" and assessed with duty at 12.5 per cent ad valorem. It is plaintiff's position that the merchandise is properly classifiable as "Footwear, of leather * * * Other * * * for other persons * * * Other * * * Valued at over $2.50 per pair," under item 700.45, TSUS, at the rate of 10 per cent ad valorem.

The question before the court is whether the "joggers" can be considered to be "of leather" for tariff classification purposes. The operative provision of the TSUS is General Headnote 9(f) of the TSUS which provides as follows:

> 9. *Definition.* For the purposes of the schedules unless the context otherwise requires—
>
> *　*　*　*　*　*　*
>
> (f) the terms "of", "wholly of", "almost wholly of", "in part of" and "containing", when used between the description of an article and a material (e.g., "furniture *of* wood", "woven fabrics, *wholly of* cotton," etc., have the following meanings:
>
> (1) "of" means that the article is wholly or in chief value of the named material.

The term "in chief value" is defined in general Interpretive Rule 10, TSUS:

> 10. *General Interpretive Rules.* For the purposes of these schedule—
>
> *　*　*　*　*　*　*
>
> (f) an article is in chief value of a material if such material exceeds in value each other single component material of the article;

While not disputing the relevance of these definitions and rules, defendant urges the Court to apply Headnote 1 of Schedule 7, Part 12 of the TSUS, which provides:

Schedule 7, Part 12:

> Headnote 1. For the purposes of the tariff schedules—
>
> * * * * * * *
>
> (c) the term "rubber or plastics" means rubber, plastics, or combinations of rubber and plastics.

It is defendant's position that this headnote clearly applies to the entire TSUS, the the rubber and plastics components must be considered together in determining the chief value of the merchandise and, therefore, the merchandise is not in chief value of leather, but of "rubber or plastics."

Defendant also relies on the *Explanatory Notes to the Tariff Classification Study, 1960 (TCS), which explains why this headnote was incorporated into the TSUS:*

> The provisions for these materials in schedule 4 are confined to basic crude forms. Headnote 1 to part 12 of the schedule defines the term "plastics" more broadly so as to include certain natural substances as well as synthetic substances provided for in the chemical schedule * * * The definition in headnote 1 of this part of the terms "rubber", "plastics", and "rubber or plastics" are concerned with their meaning as used in tariff provisions covering products made therefrom.
>
> As mentioned earlier in these explanatory notes, it is often difficult to distinguish synthetic rubber from other plastic materials. Therefore, the term "rubber or plastics" has been adopted not only as a convenience for use in formulating tariff descriptions but also to eliminate the necessity for distinguishing between these materials * * *

It is the opinion of the Court that this explanation from the TCS does not support defendant's position, and, instead, leads to the conclusion that the "joggers" are indeed of leather. The meaning of the term, "rubber or plastics" is, according to the TCS, concerned with tariff provisions in which it is used, and the purpose of the definition was to alleviate the difficulty in distinguishing *synthetic* rubber from other plastic materials, and subsequently, to eliminate the necessity for distinguishing between *them,* i.e., the synthetic rubber and other plastic materials. Not only does this language explain why rubber and plastics were combined as one term when used in the TSUS, it also demonstrates why the term has no applicability in the instant action.

The parties have stipulated that the component materials of the merchandise in question are leather, rubber and plastic, *supra.* There is no synthetic rubber present and there is no reason to combine the rubber and plastic components since there was no difficulty in distinguishing the rubber component from the plastics component. Separate values were found for each and there is no need to treat them as a single component.

The Court was enlightened but not persuaded by the excellent brief of *amicus curiae,* Footwear Division of the Rubber Manufacturers Association (FDRMA). It detailed with clarity the tariff treatment accorded to footwear under the TSUS and the Tariff Act of 1930. It explained the difficulty which arose with the advent of synthetic rubber and states that "synthetic rubber are (sic) essentially plastics * * *" which grew to be used by the rubber industry as rubber. FDRMA brief at 7. However, the Court cannot conclude that Congress intended that "rubber or plastics" must be combined for all considerations even when the term does not appear in the provision or item under consideration.

Volume Footwear Retailers of America (VFRA) has also provided the Court with an *amicus* brief in support of the plaintiff's position. Without reiterating each supporting argument made therein, we find it cogent and agree that the Congressional intent to treat "rubber and plastics" as a unitary combination throughout the TSUS is limited to those provisions where the term appears in the description of the merchandise being classified, and that Congressional intent to extend this definition to all other provisions of the TSUS is lacking.

The Court has reviewed the cases cited by the parties and *amici.* *InterPacific Corp.* v. *United States,* 8 CIT 132, Slip Op. 8497, involved the question of whether embroidery found on the exterior surface of a shoe upper was part of the upper. This case did not involve issues of material component in chief value and only involved the composition of the exterior surface are of the upper and we do not find it dispositive or persuasive in determining the issue involved in the instant action.

Miodrag Nikolic v. *United States,* 5 CIT 137, Slip Op. 8326 (1983), involved the denial of a customhouse broker's license on the basis of an erroneous answer to a question in the examination as to the classification of handbags that contained leather, cotton, nylon, and acrylic. Plaintiff had answered that the handbag would have been of leather (45%), but the correct answer was that the handbag was of textile materials (55%). The correct answer depended on a knowledge of the items of the TSUS having to do with the classification of handbags, including a provision for handbags of textile materials. No similar comparison exists in the instant case.

In conclusion, the Court has reviewed the stipulation, the pertinent statutes, tariff provisions and legislative history to the Tariff Schedules of the United States, the briefs of the parties and *amici* and all other relevant data and finds that the "joggers," the merchandise in question, are composed of leather, with leather being the component in chief value as compared to the value of the rubber and plastic components individually, and judgment is granted to the plaintiff.

Let judgment issue accordingly.

(Slip Op. 87-137)

ALYESKA PIPELINE SERVICE CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81-09-01252

Before WATSON, *Judge.*

[Defendant's motion for rehearing granted.]

(Decided December 10, 1987)

MEMORANDUM OPINION AND ORDER

WATSON, *Judge:* This matter is before the Court on defendant's motion for a rehearing under Rule 59 of the Rules of this court. In its opinion in *Alyeska Pipeline Service Co.* v. *United States,* 10 CIT ——, 643 F. Supp. 1128 (1986) the Court upheld plaintiff's claim that protests had been timely filed, overturned the classification of the importations and found that the Customs Service had improperly assigned to one entry the values of merchandise which was properly attributable to 21 entries.

The Court did not deal with a counterclaim by the government that if the Court decided that it had jurisdiction over all the entries the value increase should be distributed pro-rata over all those entries. Although the decision could be read as implying that the government must bear the consequences of its decision to place the entire value of 21 entries on a single entry, and would therefore have to refund even the correct amount of duty which might have been attributed to the other entries, that would be an unfairly harsh result.

A motion for rehearing is within the discretion of the Court. *Commonwealth Refining Co.* v. *United States,* 60 CCPA 162, 166 C.A.D. 1105, 480 F.2nd 1352 (1973); *United States* v. *Shell Oil Co., Inc.,* 44 CCPA 54, C.A.D. 637 (1957); *Thornley & Pitt* v. *United States,* 19 CCPA 221, T.D. 45325 (1931).

If the Court did not grant this rehearing, the nonassessment of admittedly correct duties of 3.5% ad valorem on the twenty entries left untouched might yield plaintiff a windfall of approximately $90,000 and would represent a failure to dispense the full justice of which the Court is capable. See *Jarvis Clark Co.* v. *United States,* 733 F.2d 873 (Fed. Cir. 1984). The Court is loath to see any party achieve an unfair advantage due to technical considerations, even when the side adversely affected has, to a certain extent, contributed to its own predicament. For the reason given above it is hereby

ORDERED that the defendant's motion for rehearing is granted, and the parties shall confer with each other and, within 30 days from the date of entry of this order, submit their suggestions for the disposition of the case.

(Slip Op. 87-138)

FAR EASTERN DEPARTMENT STORE U.S.A., INC, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84-1-00132

Before WATSON, *Judge.*

[Plaintiff's motion for summary judgment denied. Defendant's motion for summary judgment granted.]

(Decided December 11, 1987)

Glad, White & Ferguson (*Steven B. Lehat,* of counsel) for plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office; (*Barbara M. Epstein*), Civil Division, Department of Justice Commercial Litigation Branch, for defendant.

MEMORANDUM OPINION AND ORDER

WATSON, *Judge:* This action is before the Court on crossmotions for summary judgments. The imported merchandise consists of men's casual footwear, described on the commercial invoices as "Kool Komforts." The merchandise has an appearance which matches its name in that it consists of a slip-on shoe with a cotton mesh upper portion and a rubber outer sole which has flecks of cork in its body. Circling the entire shoe and covering the line between the cotton upper and the outer sole is a jute band about three-quarter of an inch wide. Under the jute band is another encircling band composed of rubber which is glued and vulcanized to the cotton mesh upper portion and to the top of the undersole.

The merchandise was exported from Taiwan and entered at the Port of Honolulu, Hawaii between December 30, 1981 and July 11, 1983. It was classified under Item 700.67 TSUS and assessed with duty at 37.5% ad valorem, plus 90 cents per pair as other footwear having foxing or a foxing-like band wholly or almost wholly of rubber or plastics applied or molded at the sole and overlapping the upper.

Plaintiff claims that the merchandise is properly classifiable under Item 700.59 TSUS at 37% ad valorem, which provides for footwear of a slip-on type "except footwear having a foxing or foxing-like band wholly or almost wholly of rubber or plastic applied or molded at the sole and overlapping the upper." Although there is some confusion in the various statements of material facts submitted by the parties, the Court's examination of the various submissions on that subject allows it to conclude that there is no genuine material issue of fact in this case. The position of plaintiff appears to be that the rubber band encircling this shoe is not foxing, either because it is not visible, or because the shoe is not the type of shoe for which the foxing category was devised, or because the joinder of the jute to the rubber band created a composite band not subject to the foxing description.

In support of its presumptively correct classification of this footwear, the government has presented the affidavit of John P. O'Neil, the vice-chairman of Converse, Inc., a manufacturer of rubber and plastic-soled footwear in the United States and elsewhere. The affidavit clearly establishes that which is not really disputed, namely, that a rubber band encircling the shoe at the point where the sole meets the upper and helping to join the two is a foxing band. The plaintiff has not presented any evidence to raise an issue as to this basic fact.

The Court finds no support for plaintiff's contention that, as a matter of law, "visibility" is a criteria of a foxing or foxing-like band within the meaning of TSUS Items 700.59. The thorough analysis of foxing set out in TD 83–116, as an aid to customs officers does not make the visibility of the band an essential element of foxing. Nor would it be reasonable to find that the simple concealment of a foxing band would eliminate the underlying foxing as a factor in classification.

Plaintiff refers to the *Tariff Classification Study,* volume 7 at page 24 for the proposition that foxing is intended only to be an attribute of footwear having the general outward appearance of the traditional "sneaker" or "tennis shoe." Plaintiff offers the affidavit of William T. Hart, a director of the Office of Executive and International Liaison at the United States International Trade Commission. That affidavit recounts Mr. Hart's recollection that the International Trade Commission decided to use foxing as the most easily identifiable characteristic of certain footwear which trade agreement negotiators did not want to allow to receive the beneficial rate of duty under Item 700.59. He identifies this category as consisting principally of "sneakers" and similar styles of footwear and athletic footwear. This insight into the negotiating pre-history of Item 700.59, however, does not represent anything approaching a legislative history indicating an intent to limit foxing to athletic footwear or to foxing which was as visible as that on athletic footwear. See, *Kuehne & Nagel, Inc.* v. *United States,* —— CIT —— Slip Op. 86–138, fn. 9 (December 22, 1986).

There is nothing before the Court to indicate that the rubber band and the jute band form one composite band, a circumstance which conceivably might make the band not wholly or almost wholly of rubber. It should be noted however that the band would still not escape the possibility of being a "foxing-like" band or a band composed chiefly of rubber. In any event, the examination of the samples submitted in conjunction with the motions and the relative ease with which the Court, without the use of tools, separated the jute band from the rubber band on plaintiff's Exhibit 1 clearly demonstrated that these bands are separate. The fact that the jute band may add strength to the joinder of the sole and the upper is irrelevant to this dispute.

In sum, an examination of the Item 700.59 claim of plaintiff demonstrates on its face that Congress must have contemplated that footwear of the slip-on type included slip-on type footwear having a foxing or foxing-like band. Otherwise the deliberate exception of that footwear would have been pointless. In other words, if footwear having a foxing or foxing-like band referred only to footwear of the sneaker or athletic-type, an exception for such footwear from a provision covering footwear of the slip-on type would have been completely unnecessary. This shows that it was within the contemplation of Congress that some footwear of the slip-on type had foxing or foxing-like bands. The footwear before the Court is a clear demonstration of the correctness of that contemplation.

For the reasons given above, it is the opinion of the Court that plaintiff's motion for summary judgment should be and the same hereby is denied and it is the further opinion of the Court that defendant's cross-motion for summary judgment should be and the same hereby is granted.

ABSTRACTED CLA

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSES
				Item No. a
C87/209	Re, C.J. December 4, 1987	New York Merchandise Co.	79-6-01054	Item 206.98 8%
C87/210	Re, C.J. December 4, 1987	Sangamo Capacitor Division	85-9-01180	Merchandise classified electrical capacitors, variable, a
C87/211	Rao, J. December 4, 1987	Dynamic Classics, Ltd.	81-10-01347, etc.	Item 772.30 12.5%, 11. 9%
C87/212	Restani, J. December 7, 1987	Border Brokerage Co.	78-10-01828, etc.	Item 653.94 653.95 657.20 or Various ra
C87/213	Tsoucalas, J. December 7, 1987	Ball Corp.	85-11-01580	Item 640.25 7.1%
C87/214	Re, C.J. December 8, 1987	Belwith Int'l, Inc.	81-9-01250	Item 546.54 Various ra
C87/215	Tsoucalas, J. December 10, 1987	Gelmart Indus. Inc.	83-7-00970, etc.	Item 376.24 32%
C87/216	Tsoucalas, J. December 10, 1987	Gelmart Indus. Inc.	85-8-01113, etc.	Item 376.24 32%
C87/217	Tsoucalas, J. December 10, 1987	Middlesex Import Inc.	86-5-00647	Item 672.14 4.1% or 3.

ASSIFICATION DECISIONS

SSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
and rate	Item No. and rate		
3	Item A203.30 Free of duty	Agreed statement of facts	San Diego Woven wood ashtrays
se as s, fixed or at 10%	Item A516.94 or A656.15 Free of duty	Sangamo Capacitor Division v. U.S., 779 F. 2d 30 (1985)	Greenville-Spartanbur Silvered mica plates
) or 735.20 1.3% or	Item A774.55 or 774.55 7.7%, 7.3% or free of duty	Dynamic Classics Ltd. v. U.S., Ct. No. 81-7-00938	New York Exercise Suits
3 657.25 rates	Item 653.50, 653.51, or 653.52 Various rates	Border Brokerage v. U.S. S.O. 85-55 (1985)	Seattle Stoves and/or heaters
5	Item A640.25 Free of duty	Agreed statement of facts	San Diego Aluminum can bodies
3 rates	Item 548.05 Various rates	Agreed statement of facts	Los Angeles Glass balls and glass knobs
3	Item 376.28 18%	Gelmart Indus. Inc. v. U.S., S.O. 87-12 (1987)	New York Brassieres
3	Item 376.28 18%	Gelmart Indus. Inc. v. U.S. S.O. 87-12 (1987)	New York Brassieres
3 3.8%	Item A672.14 Free of duty	Agreed statement of facts	Boston Sewing machinery components

ABSTRACTED

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUAT
V87/340	Tsoucalas, J. December 7, 1987	Ohio Ba Corp	86-1-00102	Transaction val

VALUATION DECISIONS

S OF ATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
alue	At the stated CIF invoiced values, less $48.01 in marine insurance and less ocean freight charges in the amount of $3,900.00	Agreed statement of facts	New York Vinyl bags

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